1948

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL,

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR - - - - - RALPH SUTTON, K.C.
ASSOCIATE EDITOR - - HENRY SALT, K.C.

REPORTERS:

Court of Appeal - - -
King's Bench,
Court of Criminal Appeal;
Appeals from County Courts;
and Railway and Canal Commission Cases.

R. F. STUBBING,
H. C. GARSIA,
J. W. HALL,
A. W. GRANT,
C. G. MORAN,
B. A. BICKNELL,
P. B. DURNFORD,
H. GREENFIELD,
H. A. PALMER,
R. P. COLINVAUX,
L. F. J. McDERMOTT,

Barristers-at-Law

R. C. CALBURN, *Barrister-at-Law*

1948—Vol. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
LONDON, E.C.4.

BIBL.
LONDIN
UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—Sir Stanley Pott

Vice-Chairman—J. H. Stamp, Esq.

EX-OFFICIO MEMBERS

Right Hon. Sir Hartley Shawcross, K.C., M.P.	Attorney-General
Right Hon. Sir Frank Soskice, K.C., M.P.	Solicitor-General
W. Alan Gillett, Esq.	President of the Law Society

ELECTED MEMBERS

J. H. Stamp, Esq. The Hon. Mr. Justice Jenkins	Lincoln's Inn
R. E. Burrell, Esq., K.C. J. V. Nesbitt, Esq.	Inner Temple
W. Price, Esq. W. Latey, Esq., M.B.E.	Middle Temple
Sir William L. McNair, K.C. S. E. Pocock, Esq., O.B.E.	Gray's Inn
H. O. Danckwerts, Esq. H. Edmund Davies, Esq., K.C.	Appointed by the Council on the nomination of the General Council of the Bar
Sir Stanley Pott (Firm : Messrs. Holmes, Son & Pott) G. D. Colclough, Esq. (Firm : Messrs. Johnson, Jecks & Colclough)	The Law Society

Secretary—J. H. Bowman, Esq.
6 Stone Buildings, Lincoln's Inn, W.C.2.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL

1948

Lord Jowitt, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Lord Greene, Master of the Rolls

Lord Merriman	President of the Probate, Divorce, and Admiralty Division
Sir Leslie Frederic Scott (retired October 6, 1948)	Lords Justices
Sir Frederick James Tucker	
Sir Alfred Townsend Bucknill	
Sir Donald Bradley Somervell	
Sir Lionel Leonard Cohen	
Sir Cyril Asquith	
Sir Frederick John Wrottesley (retired September 9, 1948)	
Sir Francis Raymond Evershed	
Sir John Edward Singleton (appointed October 14, 1948)	
Sir Alfred Thompson Denning (appointed October 14, 1948)	

JUDGES
OF
THE KING'S BENCH DIVISION
OF
THE HIGH COURT OF JUSTICE
1948

Lord GODDARD, Lord Chief Justice of England, President
Sir TRAVERS HUMPHREYS
Sir CYRIL ATKINSON (retired May 25, 1948)
Sir JOHN EDWARD SINGLETON (appointed to Court of Appeal, October 14, 1948)
Sir MALCOLM HILBERY
Sir WILFRID HUBERT POYER LEWIS
Sir STEPHEN OGLE HENN-COLLINS (retired June 4, 1948)
Sir ROLAND GIFFARD OLIVER
Sir REGINALD POWELL CROOM-JOHNSON
Sir WINTRINGHAM NORTON STABLE
Sir JAMES DALE CASSELS
Sir HUGH IMBERT PERIAM HALLETT
Sir WILLIAM NORMAN BIRKETT
Sir ALFRED THOMPSON DENNING (appointed to Court of Appeal, October 14, 1948)
Sir AUSTIN ELLIS LLOYD JONES, M.C. (transferred from P. D. and A. Division, May 13, 1948)
Sir GEORGE JUSTIN LYNSKEY
Sir JOHN WILLIAM MORRIS
Sir FREDERICK AKED SELLERS
Sir LAURENCE AUSTIN BYRNE
Sir FRED EILLS PRITCHARD
Sir GEOFFREY HUGH BENBOW STREATFEILD
Sir DONALD LESLIE FINNEMORE (transferred from P. D. and A. Division, October 11, 1948)
Sir GERALD OSBORNE SLADE (appointed June 14, 1948)
Sir PATRICK ARTHUR DEVLIN (appointed October 14, 1948)

Attorney-General
Sir HARTLEY WILLIAM SHAWCROSS

Solicitor-General
Sir FRANK SOSKICE

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1948, will be as follows :—

In the First Series,
[1948] Ch.
In the Second Series,
[1948] 1 K. B. [1948] 2 K. B. [1948] P.
In the Third Series,
[1948] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME

A. PAGE

Aberg, Rex *v.* 173
Alexander Mountain & Co. (suing as a Firm) *v.* Rumere, Ld. 436
Alliance Property Co., Ld. *v.* Shaffer 464
An Application by Beck and Pollitzer, In re, and In re The Requisitioned Land and War Works Act, 1945 339
Ashton, Ex parte. Rex *v.* Blackpool Rent Tribunal 277
Assessment Committee for Kingswood Assessment Area and Others, John Laing & Son, Ld. *v.* 116
Aston & Co., Ld. and Cornelius, Rackett *v.* 157

B.

Banks *v.* Cope Brown 287
Beck and Pollitzer, In re an Application by, and In re the Requisitioned Land and War Works Act, 1945 339
Bedrock Investments, Ld., Ex parte. Rex *v.* Paddington and St. Marylebone Rent Tribunal 413
Betteley Addyman and Jalland, Ld. *v.* Singer 405

PAGE

Blackpool Rent Tribunal, Rex *v.* Ex parte Ashton 277
Bob Guiness, Ld. *v.* Salomonsen 42
Bowness *v.* O'Dwyer 219
Boyce, Wiltshire County Valuation Committee *v.* Same *v.* Marlborough and Ramsbury Rating Authority and Orchard 125
Boydell, Ex parte. Rex *v.* Governor of Wormwood Scrubs Prison 193
Brash and Ambrose, Brown *v.* 247
Breams Property Investment Co., Ld. *v.* Stroulger and Others 1
Brookes and Another *v.* Prescott and Others 133
Brown *v.* Brash and Ambrose 247
Brown, Tithe Redemption Commission *v.* 9
Budd, Quaintways Restaurant, Ld. *v.* 231

C.

Carlish *v.* East Ham Corporation and Edwards 380
Chapman *v.* Kirke 450
Chesterfield R.D.C., First National Housing Trust, Ld. *v.* 351

PAGE
Christmas, Llewellyn *v.* – – 385
Clift *v.* Taylor – – – 394
Coleman Bros., Pearson *v.* – 359
Cope Brown, Banks *v.* – – 287
Curtis *v.* Wilcox – – – 474

D.

Darby, Hamps *v.* – – – 311
Dennant *v.* Skinner and Collom 164
Dickson, Re. Re Local Government Act, 1933 – – – 95

E.

East Ham Corporation and Edwards, Carlish *v.* – – 380
Elkington *v.* Kesley – – 256
Ellesmore Port Ex-Servicemen's Club, Judson *v.* – – – 52

F.

First National Housing Trust, Ld. *v.* Chesterfield Rural District Council – – – 351
Fitzpatrick, Rex *v.* – – 203
Foreign Judgments (Reciprocal Enforcement) Act, 1933, Re The. Syal *v.* Heyward – 443

G.

Gadsden, R. F. Fuggle, Ld. *v.* – 236
Goldrich, Langford Property Co. Ld. *v.* – – – – 423
Governor of Wormwood Scrubs Prison, Rex *v.* Ex parte Boydell – – – – – 193

H. PAGE

Hamps *v.* Darby – – – 311
Hardcastle, McIntyre and Another *v.* – – – – 82
Hemns *v.* Wheeler – – – 61
Heyward, Syal *v.* Re the Foreign Judgments (Reciprocal Enforcement) Act, 1933 – 443

PAGE
Hibbert *v.* McKiernan – – 142
Higham, Minister of Pensions *v.* 153
Hinson, Llewellyn *v.* – – 385

J.

John Laing and Son, Ld. *v.* Assessment Committee for Kingswood Assessment Area and Others – – – 116
Judson *v.* Ellesmere Port Ex-Servicemen's Club – – 52

K.

Kesley, Elkington *v.* – – 256
King, The, Reading *v.* – – 268
Kirke, Chapman *v.* – – 450
Kodak, Ld., Simpson *v.* – – 184

L.

Langford Property Co., Ld. *v.* Goldrich – – – – 423
Llewellyn *v.* Hinson. Llewellyn *v.* Christmas – – – 385
Local Government Act, 1933, Re. Re Dickson – – 95

M.

Marlborough and Ramsbury Rating Authority and Orchard, Wiltshire County Valuation Committee *v.* – – 125
Mather and Another, Smith and Another *v.* – – – 212
McIntyre and Another *v.* Hardcastle – – – – 82
McKiernan, Hibbert *v.* – – 142
Miklos and Others, Sachs *v.* – 23
Minister of Pensions *v.* Higham 153

N.

Narin, Walford *v.* – – – 176

O.

Oades *v.* Spafford and Another 74
O'Dwyer, Bowness *v.* – – 219

P. PAGE

Paddington and St. Marylebone Rent Tribunal, Rex *v.* Ex parte Bedrock Investments, Ld. – – – – – 413
Pearce and Pugh, Swindon Corporation *v.* – – – – 301
Pearson *v.* Colman Brothers – 359
Prescott and Others, Brookes and Another *v.* – – – 133

Q.

Quaintways Restaurant, Ld. *v.* Budd – – – – 231

R.

R. F. Fuggle, Ld. *v.* Gadsden – 236
Rackett *v.* Aston & Co., Ld. and Cornelius – – – – 157
Reading *v.* The King – – 268
Receiver for Metropolitan Police District *v.* Tatum – – 68
Rex *v.* Aberg – – – – 173
Rex *v.* Blackpool Rent Tribunal. Ex parte Ashton – – 277
Rex *v.* Fitzpatrick – – – 203
Rex *v.* Governor of Wormwood Scrubs Prison. Ex parte Boydell – – – – 193
Rex *v.* Paddington and St. Marylebone Rent Tribunal. Ex parte Bedrock Investments, Ld. – – – – 413
Rex *v.* Winchester Area Assessment Committee. Ex parte Wright – – – – 455
Rider, W. T. Lamb & Sons *v.* – 331
Rumere, Ld., Alexander Mountain & Co. *v.* – – – 436

S.

Sachs *v.* Miklos and Others – 23
Salomonsen, Bob Guiness Ld. *v.* 42
Shaffer, Alliance Property Co., Ld. *v.* – – – – – 464
Simpson *v.* Kodak, Ld. – – 184

PAGE

Singer, Betteley Addyman and Jalland Ld. *v.* – – – 405
Skinner and Collom, Dennant *v.* 164
Smart *v.* Spencer – – – 105
Smith and Another *v.* Mather and Another – – – 212
Spafford and Another, Oades *v.* 74
Spencer, Smart *v.* – – – 105
Stansbie *v.* Troman – – – 48
Stroulger and Others, Breams Property Investment Co., Ld. *v.* – – – – 1
Swindon Corporation *v.* Pearce and Pugh – – – – 301
Syal *v.* Heyward. Re the Foreign Judgments (Reciprocal Enforcement) Act, 1933 – 443

T.

Tatum, Receiver for Metropolitan Police District *v.* – – 68
Taylor, Clift *v.* – – – 394
Thomas *v.* Thomas – – 294
Tithe Redemption Commission *v.* Brown – – – – 9
Troman, Stansbie *v.* – – 48
Turner *v.* Underwood – – 284

U.

Underwood, Turner *v.* – – 284

W.

W. T. Lamb & Sons *v.* Rider – 331
Walford *v.* Narin – – – 176
Wheeler, Hemns *v.* – – 61
Wilcox, Curtis *v.* – – – 474
Wiltshire County Valuation Committee *v.* Boyce. Same *v.* Marlborough and Ramsbury Rating Authority and Orchard – – – – 125
Winchester Area Assessment Committee, Rex *v.* Ex parte Wright – – – – 455
Wright, Ex parte. Rex *v.* Winchester Area Assessment Committee – – – 455

CASES JUDICIALLY CONSIDERED

Baker v. *Lewis* - - [1947] K. B. 186
Applied. McIntyre and Another *v.* Hardcastle - **C. A. 82**

Bents Brewery Co., Ld. v. *Upper Agbrigg Assessment Committee* [1944] K. B. 524.
Approved. Rex *v.* Winchester Area Assessment Committee. *Ex parte* Wright - - **C. A. 455**

Brook's Wharf & Bull Wharf, Ld. v. *Goodman Bros.* [1937] 1 K. B. 534.
Applied. Receiver for the Metropolitan Police District *v.* Tatum - - **Atkinson J. 68**

Brown v. *Draper* - - [1944] 1 K. B. 309
Considered. Brown *v.* Brash and Ambrose - - **C. A. 247**

Cole v. *Harris* - - [1945] K. B. 474
Followed. Llewellyn *v.* Hinson. Llewellyn *v.* Christmas
C. A. 385

Cresswell v. *Sirl* - - [1948] 1 K. B. 241
Applied. Hamps *v.* Darby
C. A. 311

Dalton v. *Pickard* - - [1926] 2 K. B. 545
Applied. Oades *v.* Spafford and Another - - **C. A. 74**

Dewell v. *Sanders* - (1619) Cro. Jac. 490
Doubted. Hamps *v.* Darby
C. A. 311

Ellis & Sons Amalgamated Properties, Ld. v. *Sisman* [1948] 1 K. B. 653.
Explained. Hemns *v.* Wheeler
C. A. 61

Evans v. *Evans* - [1948] 1 K. B. 175
Distinguished. Thomas *v.* Thomas
Divl. Ct. 294

Frankenstein v. *Gavin's House-to-House Cycle Cleaning and Insurance Co.* [1897] 2 Q. B. 62.
Applied. Brookes and Another *v.* Prescott and Others
C. A. 133

Gotliffe v. *Edelston* [1930] 2 K. B. 378
Overruled. Curtis *v.* Wilcox
C. A. 474

Heyman v. *Darwins, Ld.* [1942] A. C. 356
Referred to. Judson *v.* Ellesmere Port Ex-Servicemen's Club
C. A. 52

Hulland v. *William Sanders & Son* [1945] K. B. 78.
Applied. Simpson *v.* Kodak, Ld.
Sellers J. 184

Jozwiak v. *Hierowski* (1948) 2 All E. R. 9
Followed. Bowness *v.* O'Dwyer
C. A. 219

Minister of Pensions v. *Ballantyne* (1948) 2 Chapman's War Pens. App. Reports 641.
Followed. Minister of Pensions *v.* Higham - **Denning J. 153**

Neale v. *Del Soto* - - [1945] K. B. 144
Followed. Banks *v.* Cope Brown
Divl. Ct. 287

Neale v. *Del Soto* - - [1945] K. B. 144
Followed. Llewellyn *v.* Hinson. Llewellyn *v.* Christmas **C. A. 385**

O'Rourke v. *Darbishire.* [1920] A. C. 581
Applied. Brookes and Another *v.* Prescott and Others **C. A. 133**

Palliser v. *Dale* - - [1897] 1 Q. B. 257
Followed. Judson *v.* Ellesmere Port Ex-Servicemen's Club
C. A. 52

R. v. *Bliss Hill* (1918) 13 Cr. App. Rep. 125
Explained. Rex *v.* Aberg
C. C. A. 173

R. v. *Rowe* - - (1859) 23 J. P. 117
Followed. Hibbert *v.* McKiernan
Divl. Ct. 142

Robert Addie & Sons (Collieries), Ld. v. *Dumbreck* [1929] A. C. 358.
Distinguished. Pearson *v.* Coleman Brothers - **C. A. 359**

Rosenthal v. *Alderton & Sons, Ld.* [1946] K. B. 374.
Distinguished. Sachs *v.* Miklos and Others - - **C. A. 23**

Seabrook & Sons, Ld. v. *Jones* [1929] 1 K. B. 335.
Distinguished. Smart *v.* Spencer
C. A. 105

Selwyn v. *Hamill* - (1948) 1 All E. R. 70
Followed. Langford Property Co., Ld. *v.* Goldrich
Birkett J. 423

Sharpe v. *Nicholls* - [1945] K. B. 382
Followed. Llewellyn *v.* Hinson. Llewellyn *v.* Christmas
C. A. 385

Sheehan v. *Cutler* - - [1946] K. B. 339
Followed. Langford Property Co., Ld. *v.* Goldrich **Birkett J. 423**

Staynings v. *Minister of Pensions* (1947) 1 Chapman's War Pens. App. Reports 319.
Not followed. Minister of Pensions *v.* Higham **Denning J. 153**

Stone Lighting & Radio Co. v. *Levitt* [1947] A. C. 209.
Distinguished. Bowness *v.* O'Dwyer - - **C. A. 219**

Taylor v. *Newman* - (1863) 4 B. & S. 89
Discussed. Hamps *v.* Darby **C. A. 311**

Thynne v. *Salmon* - [1948] 1 K. B. 482
Applied. Smith and Another *v.* Mather and Another **C. A. 212**

Vadala v. *Lawes* (1890) 25 Q. B. D. 310
Applied. *Re* The Foreign Judgments (Reciprocal Enforcement) Act, 1933. Syal *v.* Heyward **C. A. 443**

Weld-Blundell v. *Stephens* [1920] A. C. 956
Explained. Stansbie *v.* Troman **C. A. 45**

Westminster Council v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* [1936] A. C. 511.
Applied. John Laing and Son, Ld. *v.* Assessment Committee for Kingswood Assessment Area and Others - - - **Divl. Ct. 116**

Wilkinson v. *Evans* (1866) L. R. 1 C. P. 407
Distinguished. Walford *v.* Narin **Morris J. 176**

Willis v. *Wells* - - [1892] 2 Q. B. 225
Followed. Judson *v.* Ellesmere Port Ex-Servicemen's Club **C. A. 52**

STATUTES JUDICIALLY CONSIDERED

1679

Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2. Rex *v.* Governor of Wormwood Scrubs Prison. *Ex parte* Boydell - - **Divl. Ct. 193**

1777

Stat. 17, *Geo.* 3, *c. cxxv.* Wiltshire County Valuation Committee *v.* Boyce **C. A. 125**

1829

Metropolitan Police Act, 1829 (10 *Geo.* 4, *c.* 44), *s.* 12. Receiver for the Metropolitan Police District *v.* Tatum - - **Atkinson J. 68**

1832

Stage Carriages Act, 1832 (2 & 3 *Wm.* 4, *c.* 120), *ss.* 5, 48. Chapman *v.* Kirke - - - **Divl. Ct. 450**

1845

Railway Clauses (Consolidation) Act, 1845 (8 *Vict.*, *c.* 20), *s.* 109. Turner *v.* Underwood - - **Divl. Ct. 284**

1861

Metropolitan Police Act, 1861 (24 & 25 *Vict.*, *c.* 124), *s.* 1. Receiver for the Metropolitan Police District *v.* Tatum - - **Atkinson J. 68**

1876

Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36), *ss.* 186, 259. Rex *v.* Fitzpatrick - - **C. C. A. 203**

1881

Army Act, 1881 (44 & 45 *Vict.*, *c.* 58), *ss.* 158, 175, *sub-ss.* 1, 190, *sub-s.* 8. Rex *v.* Governor of Wormwood Scrubs Prison. *Ex parte* Boydell **Divl. Ct. 193**

1882

Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *ss.* 12, 24. Curtis *v.* Wilcox - - - **C. A. 474**

1889

Regulation of Railways Act, 1889 (52 & 53 *Vict.*, *c.* 57), *s.* 7. Turner *v.* Underwood - - **Divl. Ct. 284**

1893

Industrial and Provident Societies Act, 1893 (56 & 57 *Vict.*, *c.* 39), *s.* 49, *sub-s.* 1. Judson *v.* Ellesmere Port Ex-Servicemen's Club **C. A. 52**

Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 7), *s.* 4, *sub-s.* 1, *s.* 29, *sub-s.* 1. Walford *v.* Narin **Morris J. 176**

—— —— *ss.* 18, 28, 39. Dennant *v.* Skinner and Collom - - **Hallett J. 164**

1895

Summary Jurisdiction (*Married Women*) *Act*, 1895 (58 & 59 *Vict.*, *c.* 39), *ss.* 4 *and* 5. Thomas *v.* Thomas **Divl. Ct. 294**

1920

Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3. First National Housing Trust, Ld. *v.* Chesterfield Rural District Council - - **Divl. Ct. 351**

—— —— *s.* 10. Banks *v.* Cope Brown **Divl. Ct. 287**

—— —— *s.* 12, *sub-s.* 1 (*a*). Alliance Property Co., Ld. *v.* Shaffer **Slade J. 464**

—— —— *s.* 12, *sub-ss.* 1, 2 (iii.). Hemns *v.* Wheeler - - **C. A. 61**

—— —— *s.* 12, *sub-s.* 1 (*g*) *as amended by Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1935 (25 *Geo.* 5, *c.* 13), *s.* 1. Smith and Another *v.* Mather and Another **C. A. 212**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1. Bowness *v.* O'Dwyer **C. A. 219**

1924

Agricultural Wages (*Regulation*) *Act*, 1924 (14 & 15 *Geo.* 5, *c.* 37), *s.* 2, *sub-s.* 1; *s.* 7, *sub-ss.* 1, 10 (1). Smart *v.* Spencer - - - **C. A. 105**

1925

Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 9. Smith and Another *v.* Mather and Another **C. A. 212**

Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 142. Breams Property Investment Co., Ld. *v.* Stroulger and Others - - - - **C. A. 1**

Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 2, *s.* 64, *sub-ss.* 1 *and* 2, *s.* 69, *sub-s.* 2. Wiltshire County Valuation Committee *v.* Boyce - - - **C. A. 125**

—— —— *s.* 37, *sub-s.* 2 (*b*). Rex *v.* Winchester Area Assessment Committee. *Ex parte* Wright **C. A. 455**

—— —— *s.* 37, *sub-s.* 10. John Laing and Son, Ld. *v.* Assessment Committee for Kingswood Assessment Area and Others - - **Divl. Ct. 116**

Summary Jurisdiction (*Separation and Maintenance*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 2, *sub-s.* 2. Thomas *v.* Thomas - - - **Divl. Ct. 294**

1927

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4 *and* 5. Rackett *v.* Aston & Co., Ld. and Cornelius **C. A. 157**

—— —— *ss.* 4 *and* 5. Clift *v.* Taylor **C. A. 394**

1933

Foreign Judgments (*Reciprocal Enforcement*) *Act*, 1933 (23 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 1; *s.* 4, *sub-s.* 1 (*a*) (iv.). *Re* The Foreign Judgments (Reciprocal Enforcement) Act, 1933. Syal *v.* Heyward - **C. A. 443**

Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 228, *sub-s.* 1 (*d*). *Re* Dickson. *Re* Local Government Act, 1933 - - - **C. A. 95**

Rent and Mortgage Interest Restrictions (*Amendment*) *Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*g*). R. F. Fuggle Ld. *v.* Gadsden - - **C. A. 236**

—— —— *s.* 3, *sub-ss.* 1, 3, *sch. I.*, *para.* (*h*). McIntyre and Another *v.* Hardcastle - - - - **C. A. 82**

—— —— *s.* 16, *sub-s.* 1. Langford Property Co., Ld. *v.* Goldrich **Birkett J. 423**

—— —— *s.* 16, *sub-s.* 1. Llewellyn *v.* Hinson. Llewellyn *v.* Christmas **C. A. 385**

1936

Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 75. First National Housing Trust, Ld. *v.* Chesterfield Rural District Council - - **Divl. Ct. 351**

Tithe Act, 1936 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 43) *ss.* 3, *sub-s.* 1; *s.* 10, *sub-ss.* 1, 2; *s.* 13, *sub-s.* 7; *s.* 16, *sub-s.* 1. Tithe Redemption Commission *v.* Brown - - - - **C. A. 9**

1938

Cinematograph Films Act, 1938 (1 & 2 *Geo.* 6, *c.* 17), *s.* 34. Simpson *v.* Kodak, Ld. - **Sellers J. 184**

Food and Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *ss.* 24, 83. Elkington *v.* Kesley - - - **Divl. Ct. 256**

1939

Emergency Powers (Defence) Act, 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 7. Carlish *v.* East Ham Corporation and Edwards **Lord Goddard C.J. 380**

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 4. W. T. Lamb & Sons *v.* Rider - **C. A. 331**

Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch. I.* Banks *v.* Cope Brown **Divl. Ct. 287**

—— —— *s.* 3, *sub-s.* 1; *s.* 7, *sub-ss.* 1 *and* 3. Langford Property Co., Ld. *v.* Goldrich - - **Birkett J. 423**

—— —— *s.* 3, *sub-s.* 2 (*b*). Bowness *v.* O'Dwyer - - **C. A. 219**

1942

Pensions (Mercantile Marine) Act, 1942 (5 & 6 *Geo.* 6, *c.* 26), *s.* 1 (2.). Minister of Pensions *v.* Higham **Denning J. 153**

1943

Town and Country Planning (Interim Development) Act, 1943 (6 & 7 *Geo.* 6, *c.* 29), *s.* 5 *and sch. I.* Swindon Corporation *v.* Pearce and Pugh **Divl. Ct. 301**

1945

Requisitioned Land and War Works Act, 1945 (8 & 9 *Geo.* 6, *c.* 43), *Part III.*, *ss.* 15 *to* 22. *In re* An Application by Beck and Pollitzer and Others and *In re* The Requisitioned Land and War Works Act, 1945 **Croom-Johnson J. 339**

1946

Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 2. Bowness *v.* O'Dwyer - - **C. A. 219**

—— —— *s.* 2, *sub-ss.* 1 *and* 2. Rex *v.* Blackpool Rent Tribunal. *Ex parte* Ashton - - **Divl. Ct. 277**

—— —— *s.* 7. Rex *v.* Paddington and St. Marylebone Rent Tribunal. *Ex parte* Bedrock Investments, Ld. - - - **C. A. 413**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 16, *r.* 2, *Or.* 48, *r.* 1. Alexander Mountain & Co. (suing as a Firm) *v.* Rumere, Ld. - **C. A. 436**

—— *Or.* 42, *r.* 23 (*a*). W. T. Lamb & Sons *v.* Rider - **C. A. 331**

1939

Defence (General) Regulations, 1939, *reg.* 51 Carlish *v.* East Ham Corporation and Edwards **Lord Goddard C.J. 380**

—— —— (*St. R. & O.* 1939, *No.* 927), *reg.* 55AB. Betteley Addyman and Jalland, Ld. *v.* Singer **Divl. Ct. 405**

1940

Conditions of Employment and National Arbitration Order, 1940 (*St. R. & O.* 1940, *No.* 1305) (*as amended by St. R. & O.* 1944, *No.* 1437), *art.* 5 (1.) *and* (3.). Simpson *v.* Kodak, Ld. **Sellers J. 184**

1942

The Apparel and Textiles Order, 1942 (*St. R. & O.* 1942, *No.* 1000), *art.* 1. BETTELEY ADDYMAN AND JALLAND, LD. *v.* SINGER **Divl. Ct. 405**

1945

The Utility Apparel (Infants' and Girls' Wear) (Consolidation) Directions, 1945 (*St. R. & O.* 1945, *No.* 1092), *para.* 3 (2). BETTELEY ADDYMAN AND JALLAND, LD. *v.* SINGER **Divl. Ct. 405**

1946

The Fats, Cheese and Tea (Rationing) (No. 2) *Order*, 1946 (*St. R. & O.* 1946, *No.* 1116), *arts.* 8 *and* 10. QUAINTWAYS RESTAURANT, LD. *v.* BUDD **Divl. Ct. 231**

War Pensions (Naval Auxiliary Personnel) Scheme, 1946 (*St. R. & O.* 1946, *No.* 1640), *first schedule, para.* 2 (*d*). MINISTER OF PENSIONS *v.* HIGHAM **Denning J. 153**

ROYAL WARRANTS JUDICIALLY CONSIDERED

1945

Royal Warrant, dated June 18, 1945—*Army Order* 83. REX *v.* GOVERNOR OF WORMWOOD SCRUBS PRISON. *Ex parte* BOYDELL - **Divl. Ct. 193**

Royal Warrant for regulating Pay, Appointment, Promotion and Non-Effective Pay of the Army, 1940, *art.* 21. REX *v.* GOVERNOR OF WORMWOOD SCRUBS PRISON. *Ex parte* BOYDELL - - **Divl. Ct. 193**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

BREAMS PROPERTY INVESTMENT CO. LIMITED *v.* STROULGER AND OTHERS.

C. A.

1948

Mar. 1, 2, 3, 24.

Scott, Bucknill and Asquith L.JJ.

Landlord and tenant—Quarterly tenancy—Term restricting landlords right to give notice within three years of tenancy—Sale of reversion without notice of covenant—Obligation "with reference to the subject "matter of the lease"—Covenant affecting landlord qua landlord—Term binding on purchaser without notice—Repugnancy—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 142.

Agreements for quarterly tenancies between the plaintiff company's predecessors in title, as landlords, and the defendants contained a clause to the effect that the landlords would not, during the period of three years from the beginning of the tenancies, serve notice to quit on the tenants except in the event of the landlords requiring the premises for their own occupation and use. The landlords sold the reversion of the premises comprised in the agreements to the plaintiff company without informing them of the clause restricting the landlords right to give notice to quit. After the completion of the purchase the plaintiff company, who did not require the premises for their own use, gave the defendants a quarter's notice to determine their tenancies, and, on the failure of the defendants to comply with such notices, brought actions to recover possession, contending that the clause in the agreements

C. A.

1948

BREAMS PROPERTY INVESTMENT CO. LD. *v.* STROULGER.

restricting their right to give notice was not a covenant running with the reversion, and therefore binding on them without notice, and also that such a covenant was repugnant to the nature of a quarterly tenancy.

Held (1.) that the clause was made " with reference to the subject-" matter of the lease " within the meaning of s. 142 of the Law of Property Act, 1925, by reason of the fact that it was a clause which affected the landlord qua landlord and was, consequently, a covenant running with the reversion which bound the plaintiff company as purchasers of the reversion, although they had received no notice of it and, (2.) that as the clause merely attached a condition to the quarterly right to give notice, by suspending it during the first three years of the tenancies except in the event of the landlords requiring possession of the premises for their own use and occupation, it was not repugnant to the nature of a quarterly tenancy, and was binding on the plaintiff company with the result that they were not entitled to possession.

By agreements dated July 19, 1946, Hulton Press, Ld., the predecessors in title of the plaintiff company, Breams Property Investment Co. Ld., let to the defendants, B. Stroulger, Microgage, Ld., and the Squire Paper Co., Ld., three separate properties in the Field House, Breams Buildings, Chancery Lane, W.C., on quarterly tenancies as from March 25, 1946. The agreement, in the case of the Squire Paper Co., Ld., by cl. 5 provided that Hulton Press, Ld., would not during the period of three years from March 25, 1946, serve notice to quit or otherwise determine the tenancy except only in the event of the landlords requiring the premises for their own use and occupation. The agreements with the other two defendants contained no corresponding term, but they alleged that as the result of letters passing between their solicitors and the then landlords' solicitors, it was agreed that their agreements should be subject to the same limitation with regard to notice, as that contained in cl. 5 of the agreement with the Squire Paper Co. On June 24, 1946, the plaintiff company agreed to purchase from Hulton Press, Ld. the whole of their interest in Field House, Breams Buildings and the sale was completed on August 21, 1946. The purchase by the plaintiff company was made subject to and with the benefit of the tenancies set out in a schedule attached to the purchase deed ; among them, the tenancies granted to the defendants, which were described as quarterly tenancies. In the schedule to the agreement for sale the accommodation provided by, and the rent of the premises let, was specified but no other details were given. Before the completion of the purchase, the plaintiff company's solicitors made requisitions as to the tenancies in existence and the vendors disclosed the three agreements with the defendants of July 19, 1946, but did not disclose any of the letters passing between the defendants' solicitors and the vendors' solicitors or give the plaintiff company's solicitors any information regarding the existence of such letters. No information was given to the defendants that a sale of the property had taken place. On June 21, 1947, the plaintiff company who did not require the premises for their own use, served a quarter's notice to quit on each of the defendants, following a previous notice, which had been given and waived by acceptance of rent, and on the failure of the defendants to comply with the notices, brought actions against them for possession. On November 14, 1947, the actions were consolidated by order of Denning J.

Oliver J. held that the plaintiff company were not entitled to possession as against the Squire Paper Co. by reason of the fact that it had not been proved that the plaintiff company required the premises for their own occupation and use as stipulated in cl. 5 of the agreement with them. With regard to the defendants B. Stroulger and Microgage, Ld., he held that the plaintiff company were entitled to possession of the premises occupied by them. In his opinion the letters on which those defendants relied related merely to the agreement with the Squire Paper Co. and not to those of the other defendants and, consequently, cl. 5 of the agreement with the Squire Paper Co. did not apply in the case of the agreements with the other defendants. The defendants, B. Stroulger and Microgage, Ld. appealed.

Holroyd Pearce K.C. and *Donald McIntyre* for the defendants. On the construction of the letters passing between the parties and their solicitors, Oliver J. was wrong in holding that the plaintiffs were not bound by the term restricting the right of the plaintiff company to give notice. That arrangement was a term of the tenancy agreement and not merely a warranty. Accordingly it was binding on the plaintiff company and there was no repugnancy in such an agreement.

Beney K.C. and *S. Terrell* for the plaintiffs. On the construction of the letters Oliver J. was right in holding that they only had reference to the agreement with the Squire Paper Co. In the alternative, if they referred to all the three agreements, their effect was to bind Hulton Press, Ld., personally, and not their successors in title who took without notice of the letters.

C. A.
1948
Breams Property Investment Co. Ld. v. Stroulger.

If, however, it should be held that the provisions of cl. 5 in the agreement with the Squire Paper Co. formed part of the agreements with the defendants, that term was not binding on the plaintiff company, by reason of the fact that it was not an "obligation under a condition or of a covenant entered into by "a lessor with reference to the subject matter of the lease" within the meaning of s. 142, sub-s. 1, of the Law of Property Act, 1925 (1), and consequently did not run with the reversion and could not bind the plaintiff company as reversioners who had no notice of it. Further, the term was repugnant to the tenancies created by the agreements. A tenancy must be for a term certain, whether it be a term of years or for lives or a periodic tenancy such as a yearly, quarterly or monthly tenancy. A term of an uncertain period is invalid, e.g., a tenancy for the duration of the war (see *Lace* v. *Chantler* (2) and particularly the observations of Greene M.R.). In the present case, if the tenancy had been for three years certain subject to termination at any quarter day by the tenant giving notice to quit or by the landlord, in certain events, giving such notice, it might well have been valid, because it would still be a tenancy for a fixed term of three years, even though subject to a defeasance. A quarterly tenancy cannot exist alongside of a condition that it is not to be a quarterly tenancy during the first three years if certain events happen. All the cases of this type in which a term such as that found in the present case has been held not to be repugnant to the nature of the periodic tenancy are cases in which the term has been in the nature of a defeasance coming into operation during the term certain. [They also referred to *Browne* v. *Warner* (3), *The Cheshire Lines Committee* v.

---

(1) Law of Property Act, 1925, s. 142, sub-s. 1: "The obligation "under a condition or of a "covenant entered into by a "lessor with reference to the "subject matter of the lease "shall, if and as far as the lessor "has power to bind the rever-"sionary estate immediately "expectant on the term granted "by the lease, be annexed and "incident to and shall go with "that reversionary estate, or the "several parts thereof, notwith-"standing severance of that rever-"sionary estate, and may be "taken advantage of and enforced "by the person in whom the term "is from time to time vested by "conveyance, devolution in law, "or otherwise; and, if and as "far as the lessor has power to "bind the person from time to "time entitled to that reversionary "estate, the obligation aforesaid "may be taken advantage of and "enforced against any person so "entitled."

(2) [1944] K. B. 368, 370, 371.

(3) (1807) 14 Ves. 156.

Lewis & Co. (1), *Forbes* v. *Git and Others* (2), *Allison* v. *Scargall* (3).]

Holroyd Pearce K.C. in reply. The plaintiff company in this case had actual notice through their agents of all the terms in the agreement and they also had constructive notice, because a purchasing landlord has notice of the terms of a sitting tenant's tenancy (per Farwell L.J., *Hunt* v. *Luck* (4)). Further the term concerns the landlord, qua landlord, and so runs with the reversion and binds a purchaser even without notice. (See Law of Property Act, 1925, s. 142, and Cheshire's Modern Real Property, 5th ed., pp. 214, 215.) With regard to the question of repugnancy, there is nothing repugnant in a quarterly tenancy which cannot be determined for three years, and the court should give effect to the intentions of the parties. (*H. & G. Simonds, Ld.* v. *Heywood* (5), *Allison* v. *Scargall* (3), *Mardell* v. *Curtis* (6), *In re Threlfall* (7).) *The Cheshire Lines Committee* v. *Lewis & Co.* (1) and *Browne* v. *Warner* (8) relied on by the plaintiffs can be distinguished on the ground that they were cases in which the suspension of the landlords' right to serve notice to quit would have given the tenant a lease for life, a different kind of tenancy and one which the parties probably did not intend. The doctrine of repugnancy is merely a rule of construction directed to exclude terms which the parties cannot have intended (*Forbes* v. *Git and Others* (2)).

Cur. adv. vult.

March 24. The following judgments were read.

The judgment of SCOTT L.J. was read by BUCKNILL L.J. [His Lordship referred to the facts and reviewed the correspondence passing between the agents and solicitors of the parties concerned and expressed the view that except that the term of the agreements in relation to the restriction on the right to give notice was, in the case of the tenants other than the Squire Paper Co., Ld., expressed, not in the formal agreement but only in the correspondence, particularly in the letter enclosing the written agreements, in which the term was treated as a condition of the delivery of the counterparts, there was no difference between the case of the Squire Paper Co. and the other two. Continuing, his Lordship said :]

---

(1) (1880) 50 L. J. (Q. B.) 121.
(2) [1922] 1 A. C. 256.
(3) [1923] 3 K. B. 443.
(4) [1901] 1 Ch. 45, 49.
(5) [1948] 1 All E. R. 260.
(6) [1899] W. N. 93.
(7) (1880) 16 Ch. D. 274.
(8) 14 Ves. 156.

The next step is to consider whether the purchasers were or were not bound by the bargain which their vendors had made with the defendants as tenants of the estate sold. Mr. Holroyd Pearce submitted (1.) that the burden of the limitation upon the landlord's freedom to give notice to quit restricted to the first three years was one which runs with the reversion and is therefore binding on the plaintiffs without notice ; and (2.) if notice to the purchasers was legally necessary, that the knowledge of Wood & Company, the agents of Hulton Press, Ld., was notice to the plaintiffs as their principals. In answer to the first of those contentions, Mr. Beney argued that the arrangements contained in the letters was "personal" to Hulton Press, Ld. and therefore did not run with the reversion ; and in answer to the second, that knowledge of Wood & Company was not notice to their new principal, the purchasers from Hulton Press, Ld. In regard to the Squire Paper Company's agreement, cl. 5 of which made it different from the others, he submitted that the clause was repugnant to the quarterly tenancy and should be treated by the court as deleted ; and consequently that the learned judge was in error in not so holding. The argument of repugnancy he also used as a third string to his bow in regard to the other two defendants.

I will consider the repugnancy point first. In the Squire Paper Company's agreement, cl. 5, in my view, attached a condition to the quarterly right to give notice by suspending it during the first three years if, but only if, the landlord's object in giving the notice is to raise the rent, or to hand over possession to new tenants but leaving the landlord's right to give the notice untrammelled by any condition if he wanted possession for his own occupation. It is noticeable that it also expressly provides that the condition shall not for the purpose of either limitation have any operative effect "if the tenants "shall commit any breach of the agreements on their part "herein contained." In my opinion, there is no repugnancy in that clause with the quarterly tenancy ; it is only an added condition. I therefore think that the learned judge was right in his decision upon the issue in the consolidated action between the plaintiffs and Squire Paper Co., Ld.

Turning now to the question whether the burden of the material term of the agreement "ran with the reversion" so as to bind the plaintiffs without notice, in my opinion it did in equity, and even at law.

In each case the agreement was for a "term of years "absolute" within s. 205 of the Law of Property Act, 1925, and also was a lease for a term not exceeding three years within the meaning of s. 54, sub-s. 2, of that Act; with the result that s. 52, sub-s. 2 (*d*) excepted them from the nullifying effect of sub-s. 1 of that section which invalidates leases for more than three years unless made by deed. If the agreement contained in the correspondence can be regarded as a condition of the contract contained in each of the signed "agreements," the only question remaining for consideration is whether the obligation entered into by the lessor in that total bargain was "with reference to the subject-"matter of the lease" within s. 142 of the Act. If it was, the burden passed by reason of that section to the plaintiffs. The phrase "subject-matter of the lease" was, as we know, substituted for the ancient expression "touching and con-"cerning the land." Professor Cheshire's elucidation of its meaning on pp. 214-5 of the 5th ed. of his book on "Modern "Real Property," in my respectful opinion, supplies the true test. "If a simple test," he says, "is desired for ascertaining "into which category a covenant falls, it is suggested that the "proper inquiry should be whether the covenant affects either "the landlord qua landlord or the tenant qua tenant. "A covenant may very well have reference to the land, but, "unless it is reasonably incidental to the relation of landlord "and tenant, it cannot be said to touch and concern the land "so as to be capable of running therewith or with the reversion. "Tested by this principle the following covenants have been "held to touch and concern the land." Of the covenants by the tenant running with the land that "to pay rent or "taxes" and "not to assign or underlet," and by the landlord running with the reversion, "to renew the lease" are the most apposite of the instances which he quotes from decided cases. Although the case of a limitation upon, or condition precedent to a right to serve a notice to quit, does not appear to have been the subject of judicial decision, his principle that, if a covenant affects a landlord qua landlord, it must necessarily run with the reversion, appeals to me as a sound criterion. One object of that rule of law is to prevent just the sort of thing that was done in the present case.

I see no difficulty in treating the composite written agreement, consisting on the one hand of the more formal "original" and "counterpart," and on the other of the correspondence, referred to above, down to August 1, 1946, in the course of which the counterpart was forwarded to the solicitors for Hulton Press, Ld., by the defendant's solicitors, in their letter of July 12, and made expressly subject to its terms, as together constituting the "instrument" to which s. 6, sub-s. 2, of the Act is directed. Had the whole agreement been by correspondence, that position would have been obvious. Even if at law there were doubt, equity supplies the necessary help. Specific performance would have been granted. If equity would have directed a single document to be drawn up to embody the conditional term in the case of the other two tenancies as was done by the parties in the Squire Paper Company's lease, the written instrument must now be treated as if that had been already done.

That conclusion renders Mr. Holroyd Pearce's alternative argument based on implied notice superfluous; but I doubt whether he could have established any such duty on the agents to inform their new principal of the additional term, if it was merely personal and did not run with the reversion, as would have been necessary to satisfy the doctrine of implied notice.

The two appeals must be allowed with costs here and below.

BUCKNILL L.J. Since we are differing from the conclusions of the trial judge on the question whether Hulton Press, Ld., made any agreement with Stroulger or Microgage, Ld., about security for three years I will add a few words of my own on that point. [His Lordship referred to the correspondence, and continued:] In my opinion the letters constituted an agreement between Hulton Press, Ld., on the one hand and Stroulger and Microgage, Ld. on the other hand, that they would not terminate their tenancy agreements for three years from the date of the agreement unless they required the premises for their own occupation. Oliver J. decided in favour of Squire Paper Co. on the plaintiff company's contention that cl. 5 of their agreement was personal to Hulton Press, Ld., and was also repugnant to a quarterly tenancy. Although the plaintiff company do not appeal from that decision, Mr. Beney contended on their behalf that if the letters formed a clause in the tenancy agreements with Stroulger and Microgage, Ld., such a clause was personal and collateral and, therefore, not binding on the plaintiff company and was also repugnant to a quarterly tenancy. On these points of law I agree with the judgment of SCOTT L.J. and have nothing to add. I agree that the two appeals should be allowed.

ASQUITH L.J. I agree. It seems to me quite impossible to maintain that the correspondence from July, 1946, did not cover the agreements with Stroulger and Microgage, Ld., but related only to that with the Squire Paper Co., or that the intention of that correspondence is anything else but to incorporate in the agreements with the first two, the equivalent of cl. 5 in the agreement with the Squire Paper Co. It seems also clear that the term so incorporated touched or concerned the things demised, or, to use the modern statutory expression "referred to the subject matter of the lease." If so, its burden devolved on the plaintiff company as assignees of the reversion whether they had notice of it or not. On the question of repugnancy and other questions, I have nothing to add. I agree that the appeals should be allowed.

Appeals allowed.

Solicitors for the plaintiffs: *Kenneth Brown, Baker, Baker.*
Solicitors for the defendants: *Griffinhoofe & Brewster.*

P. B. D.

TITHE REDEMPTION COMMISSION *v.* BROWN.

C. A.
1948
Apr. 6, 7.

Lord Greene M.R., Somervell L.J. and Roxburgh J

Tithe — Redemption annuities — Land in possession of two or more owners—Duty of Tithe Redemption Commission to apportion—Liability, pending apportionment, of part owner for whole instalment of original annuity—Tithe Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 43), *ss.* 3, *sub-s.* 1; 10, *sub-ss.* 1, 2; 13, *sub-s.* 7; 16, *sub-s.* 1.

Where land in respect of which a tithe redemption annuity is charged under s. 3, sub-s. 1, of the Tithe Act, 1936, is divided between two or more owners, the Tithe Redemption Commission may, pending apportionment by them under s. 10, sub-s. 1 of the Act, recover the whole of the original annuity from any of the part owners, who may then claim contribution from the other or others under s. 13, sub-s. 7.

APPEAL from Chichester county court.

The applicants, the Tithe Redemption Commission, claimed to recover from the respondent, Raymond Brown, a sum of 280*l.* 16*s.* 3*d.* as consideration money for the compulsory redemption of tithe annuities charged under the Tithe Act,

C. A.

1948

Tithe Redemption Commission *v.* Brown.

1936 (1) in respect of lands known as Nos. 367A, 418D, 4, 6, 8 and 419E2 at Felpham, Sussex, and also a sum of 5*l.* 1*s.* 4*d.* for instalments of the said annuities for one half-year, due on October 1, 1946. The respondent opposed the application on the grounds (in effect) (I.) that the redemption notice was bad in that it purported to include with annuities compulsorily

(1) The Tithe Act, 1936, s. 3, sub-s. 1 : " Subject to the pro- " visions of this Act, an annuity (to " be called a ' redemption " ' annuity ') shall be charged in " respect of the land out of which " a tithe rentcharge extinguished " by this Act issued immediately " before the appointed day, for the " use of His Majesty . . . ."

Section 9, sub-s. 1 : " As soon " as may be after the appointed " day, the Commission shall deter- " mine in relation to every district " the amount of each annuity " charged in respect of land in the " district and the land in respect " of which each such annuity is " charged, and shall prepare a " register specifying the amount " of each such annuity . . . ."

Section 10, sub-s. 1 : " Subject " to the provisions of this Act, " the Commission shall, in every " case in which they ascertain that " an annuity is charged in respect " of land in the ownership of two " or more owners, apportion the " annuity as between the several " parts of the land that are in " different ownership in such " manner as appears to the Com- " mission to be just and " equitable."

Sub-section 2 : " When the " Commission have apportioned an " annuity, they shall make an " order specifying the amount " apportioned to each part of the " land, and, subject to the pro- " visions of this Act, where such " an order is made, the existing " annuity shall be deemed to have " been extinguished as from the " day following the last payment " date before the date on which " the order is made, and annuities " (in this Act referred to as ' sub- " ' stituted annuities ') of the " amounts apportioned to the " several parts of the land shall be " charged by virtue of this Act in " respect of those parts respec- " tively . . . ."

Section 11 provides for the compulsory redemption of annuities of one pound or less or annuities charged in respect of land divided, or about to be divided, for building or other purposes, into numerous plots.

Section 13, sub-s. 7 : " Where " an annuity is charged in respect " of land in the ownership of two " or more owners, any one of those " owners who makes pursuant to " this Act a payment in respect of " an instalment of the annuity, " or in respect of an amount " payable in respect of the " compulsory redemption of " the annuity, shall be entitled " to recover from the other, or " from each of the others, of them " as a simple contract debt such " proportion of the payment as " may be agreed between the " owners or, in default of agree- " ment, may be fixed by the appro- " priate authority."

Section 16, sub-s. 1 : " An " instalment of an annuity payable " on any payment date shall be a " debt due to His Majesty from " the person who is on that date " the owner of any land in respect " of which the annuity is charged."

redeemable, others which were not compulsorily redeemable; (2.) that the commission having ascertained that the lands in respect of which the annuities were charged were in the ownership of two or more persons had failed to carry out their duty to make an apportionment under s. 10, sub-s. 1, of the Act, and that in default of such apportionment they were not entitled to claim the whole original annuity from the respondent as owner of part only of the lands, but only a substituted annuity. The first ground was applicable only to the redemption money; the second applied both to the redemption money and the instalment.

The county court judge gave judgment for the respondent on both grounds. The applicants, being of opinion that ground (1.) was good in law, did not appeal as to the redemption money, but appealed as to the instalment. After the judgment in the county court the respondent, to avoid the expense of an appeal, offered to pay the 5*l.* 1*s.* 4*d.* with costs, but the commission declined to accept this payment unless accompanied by an admission of liability or an undertaking to pay future instalments as they fell due. To these terms the respondent would not agree.

Diplock K.C. and *Quintin Hogg* for the Tithe Redemption Commission. When the old tithe in kind was converted into tithe rentcharge, a characteristic of that rentcharge was that when the land on which it was charged was split the whole sum could be recovered against the owner of any part of the land. The liability could be got rid of only by a formal legal apportionment. Informal apportionments were binding only on the part owners of the land, not on the tithe owner. The Tithe Act, 1936, substitutes tithe redemption annuities terminable in sixty years, for the tithe rentcharge. They are made a charge " in respect of " not " on " the land, and are payable by the owner " for the use of His Majesty," and the Tithe Redemption Commission created by the Act carries out its functions on behalf of the Crown. The task of the commission is an enormous one: there are 11,500 tithe districts, and the register contemplated under s. 9 of the Act is not yet completed, and no register yet exists for the district concerned in the present case. Two duties are laid on the commission by s. 9 these are, in chronological order, (*a*) to determine the annuities, (*b*) to prepare the register. Section 10 is the section directing apportionment, but by sub-s. 2 the original annuity continues

C. A.
1948
Tithe Redemption Commission v. Brown.

until the apportionment is made. The view that a part owner can be charged with the whole pending apportionment is borne out by s. 13, sub-s. 7, and s. 16, sub-s. 1, which refers to the owner of " any " land, not " the " land. Nor is a " determin-" ation " by the commission a condition precedent to liability: the effect of s. 3 is by itself to create a liability on the owner of any land subject to tithe rentcharge, to pay in lieu thereof an appropriate redemption annuity, ascertainable by a simple arithmetical sum, being slightly less than the rentcharge on agricultural land, and slightly more on other land. The notice of opposition to the commission's claim set out four grounds, of which the first two were applicable only to the notice of redemption, and the third has been disposed of by agreement. The fourth, which is applicable equally to redemption and instalments, denies that any apportionment has been made under s. 10. Such apportionment is not a condition precedent to recovery. There is nothing surprising in a continuation of the old system by which tithe rentcharge was recoverable from a part owner. Section 3 imposes automatically an original redemption annuity—s. 10, sub-s. 1, lays on the commission a duty to apportion a liability already imposed by s. 3, and s. 10, sub-s. 2, defines the date on which the original annuity is extinguished. The liability continues till that date. On any other view s. 13, sub-s. 7, becomes entirely otiose.

Jukes for the respondent. This appeal is misconceived. The commission claimed from me two sums of money with costs. Having failed in those claims they have admitted the correctness of the judgment as to the larger claim, and to avoid the expense of an appeal I have offered to pay the other in full. There is no reason to come to this court.

[Lord Greene M.R. There is a judgment against them, which would be an estoppel if they do not get rid of it. They are entitled to have their appeal heard.]

The point they have now taken was never mentioned to the court below at any stage. This matter has been going on for ten years, and a very large number of notices demanding apportionment have been served. The commission should have determined the global annuity under s. 9, and forthwith apportioned under s. 10. The reference in s. 16, sub-s. 1, to " the owner of any land in respect of which the annuity is " charged " must mean " the owner of any land in respect " of which the annuity is lawfully charged," and the only annuities lawfully chargeable in respect of this land are the substituted annuities which the commission were bound to apportion. I say that apportionment must be made "forth-"with," or at any rate "within a reasonable time."

[Lord Greene M.R. The question of reasonable time was not raised in your pleading, no evidence was called on it. and the judge has given no finding on it. You cannot raise it here, for you have not laid the necessary foundation of fact. We cannot assume that the time is unreasonable.]

Section 13, sub-s. 7, is capable of a reasonable meaning apart from the construction put on it by the commission. The duty to apportion arises "when the commission ascertain" the fact of division, not before. It might happen that the ownership was divided, but for some reason notice was not at once given to the commission. Till it was so given, or possibly if it was given so shortly before a payment date that apportionment was impossible before that date, they might be able to claim the whole from the part-owner leaving him to his rights under s. 13, sub-s. 7.

Lord Greene M.R. This appeal has given rise to an interesting discussion as to the incidence of the liability for redemption annuities created by the Tithe Act of 1936. The action was brought in the Chichester county court by the Tithe Redemption Commission against the respondent, who is the owner of some plots of land in the neighbourhood of Chichester. Two claims were made. The first claim was to the effect that the Tithe Redemption annuities alleged to be charged in respect of those plots of land were subject to compulsory redemption under the Act. The second branch of the claim was for certain arrears of annuity which had become payable, so it was alleged, in respect of those plots of land. The learned county court judge dismissed the action and the order of dismissal, of course, went to both claims. By far the more important of the two claims, from the financial point of view, was the first, namely, in respect of compulsory redemption. It was to that claim that the argument was mainly, or, it may be, practically entirely, directed. It is with that claim alone that the learned judge expressly deals in his judgment.

I can get rid of the first claim after a very few remarks. The judge dismissed it on two grounds. The second ground was that in any event the right to compulsory redemption had not yet arisen because, as it was said, the parcels of land

C. A.
1948

Tithe Redemption Commission v. Brown.

Lord Greene M.R.

in respect of which the question arose, were parcels originally forming parts of certain larger parcels in respect of which the old tithe rentcharge had been charged. The judge held that on the true meaning of the Act, the right to compulsory redemption in such a case could not arise until the procedure of apportionment which the Act contemplates had been gone through, with the result that the original amount chargeable in respect of the larger parcel as a whole must, first of all, be apportioned between the bits which are held by different owners. There is no appeal against that part of the judgment. It is admitted that the notice was irregular and on that ground alone that part of the action had to be dismissed. The second reason, however, is more important because if the judge was right in taking the view that he did, that apportionment was a condition precedent to the liability to compulsory redemption, it follows from the language of the Act that apportionment was also a condition precedent in the case of a claim for annuity. Therefore, the second reason for dismissing the first part of the claim was, in itself, a sufficient reason for dismissing the second part of the claim, provided it was right in law. The only matter appealed before us is the second part of the claim. We had some discussion as to whether the reason for dismissing that part of the claim could be definitely and surely ascertained from the judgment of the learned judge. In my opinion it can, as the reason for dismissing it was that reason alone, namely, the fact that no apportionment had taken place.

Mr. Jukes complained of the action of the commission in coming to this court. He pointed out that his clients, since the judgment, had made an offer to pay the amount of the arrears of the annuity, but they did so in terms which still asserted the correctness of the judgment in that respect. Quite obviously, it was impossible for the commission to accept any such offer, and they could not be reasonably expected to accept it, unless it was in effect accompanied by an admission that the judgment was wrong in that respect, and a submission to have the judgment reversed by order of this court. Nothing of the kind was done. I merely mention that as a preliminary point to show I have not overlooked it. In my opinion, the commission were perfectly entitled to come to this court to get rid of a judgment against them which was based on a view of the law which they say, and which I agree, was an incorrect view.

There are two other preliminary points which I should mention to clear them out of the way. The Act, to the sections of which I shall refer in a moment, appears to contemplate a thing which is called a determination by the commission, which is to fix the amount of the annuity charged against any given piece of land. It is to be fixed by reference to a formula which is to be applied to the old pre-existing tithe rentcharge. There is another piece of procedure to be gone through in a case where such a piece of land, either at the date when the Act comes into operation, or at some later date, is or becomes, divided up amongst different owners. That procedure is the procedure of apportionment to which I have already referred. The only point which was made in the notice of opposition of the present respondent disputing the propriety of the claim for these arrears, was based on the proposition that no apportionment had taken place. It was not alleged, nor was it argued, that the claim was equally invalid because what is logically the earlier step of a determination had not taken place. In view of r. 11 of the County Court Rules applicable to proceedings under the Tithe Act, if it had been desired to raise any such point as a defence notwithstanding the fact that it was not pleaded, the leave of the judge would have been required. It was never asked for. Obviously, if there was anything in the point it could be only decided on the basis of a finding of fact, namely, that there had been no such determination. There is no such finding for the very simple reason that the point was never raised, nor was any available evidence called with regard to it. We ruled that the point could not be taken in this court because we could not assume what facts would have been found by the judge if the matter had been raised before him.

The other point which I will get out of the way was the suggestion, as I understood it, that if apportionment is not a necessary condition precedent from the beginning, so to speak, it becomes a condition precedent to liability if the Tithe Commission unreasonably delay in making an apportionment. Not only is that a proposition which, it seems to me, it is quite impossible to extract from the Act, but it is one which we certainly cannot listen to in this court, because even if in law it were a sound proposition, the necessary basis of fact, namely, that a reasonable time had elapsed, is absent. The point was never put to the learned judge, there is no finding upon it, there was no evidence called upon it. That point we also ruled out.

C. A.

1948

TITHE REDEMPTION COMMISSION *v.* BROWN.

Lord Greene M.R.

Having got rid of these preliminary matters, I can deal with the substantial point of the case, namely, whether apportionment is necessary before there can be any liability on the owner of a part. The claim for arrears of annuity is in respect of three areas, one, a large area called 367A, secondly, certain small areas consisting of pieces 4, 6 and 8 of 418D, etc., as it is called, and thirdly, part of 419E. With regard to those last two, 4, 6 and 8 of 418D, etc., and part of 419E, those are parts which are in the sole ownership of Mr. Brown. The apportionment had been made of the annuity referable to the land out of which these parts had been cut. The apportioned parts of the annuity had been ascertained, and so far as regards those parcels separately owned by Mr. Brown, there is no question before us but that the judgment was wrong in dismissing the claim with regard to those apportioned parts. The amount is a small one; it is, I think, 4*s.* 9*d.* for a half year's annuity, or something like that. Nevertheless, the judgment was wrong with regard to that.

The important point involved is in relation to the claim to the annuity in respect of the other area, 367A. The respondent is the owner of part of that. No apportionment has taken place of the tithe redemption annuity referable to that area. He is being sued for arrears of the whole of the annuity referable to that area, and not for an apportioned part, for the simple reason that no apportionment has yet taken place. He contends that he is not liable to be sued for the whole of the annuity but that the commission is only entitled to sue him for an apportioned part if, and when, an apportionment is made. The judge accepted that view of the Act. I need say no more on the redemption point, but if that view of the Act is right, then two consequences follow: (1.) there was no case for redemption, and (2.) there is no right to sue the defendant for this unapportioned annuity. Precisely the same words give rise to these different consequences, and that is why the decision of the judge on the second of the two points on which he dismissed the claim for redemption, necessarily involves dismissal of the claim for the annuity.

Under the Act the old tithe rentcharge was to be apportioned and in place of it there were created redemption annuities. The annuities are terminable annuities; they last for sixty years, after which they disappear. Under the law as it existed before the Tithe Act, 1936, tithe rentcharge was a charge on the land itself, and it was charged on specific identifiable parcels of land pursuant to the original procedure under the old Acts. The law was this, that apart from a legal apportionment, the tithe owner was always entitled to sue for the whole amount any person who had become the owner of a part of a plot of land which was subjected to a sum of tithe rentcharge There were, of course, informal apportionments which landowners entered into on occasions when land got broken up, but those informal apportionments did not bind the tithe owner, although they would be binding between the parties to them. By that means, a purchaser of a part of a piece of land could obtain redress if he was called on by a tithe owner to pay the whole.

That being the existing position at the date when the provisions of this Act came into force, namely, on October 2, 1936, land in this country was divided up into a number of different plots, each subject to tithe rentcharge. The tithe rentcharge was charged on the original plot and not on the subsequent sub-divisions of it. By the Act, tithe rentcharge is extinguished, and by s. 3, sub-s. 1, the redemption annuities are brought into existence, new redemption annuities which are to take the place of the old tithe rentcharge. They are to be annuities charged " for the use of His Majesty," in other words, they are matters of charge as between the Crown and the subject. They are no longer existing for the benefit of the tithe owner—he is out of the picture altogether. They are now a charge in favour of His Majesty. The reason of that, of course, is that the compensatory provisions of the Act in favour of the old tithe owners are undertaken by the revenue, and this is a method of recouping the revenue for the compensation it provided.

[His Lordship read s. 3, sub-s. 1.] Those words are important because at the date of this Act in the case of, let me say Whiteacre, which since the charge of the original tithe rentcharge had become owned by three persons, it was : " land out " of which a tithe rentcharge extinguished by this Act issued," the totality of the tithe rentcharge issued out of the totality of the land, and affected every one of the three several owners whom I am assuming, up to the total amount of the tithe rentcharge. That was the position. That tithe rentcharge is to be extinguished, and in its place there is to be charged in respect of some land, which is Whiteacre in the example which I have taken, the new redemption annuity ; and by sub-s. 2 the amount of the redemption annuity is to be ascertained in accordance with a formula which produces a different result according to whether such land is, or is not, agricultural land It seems to me quite clear, according to that section, that on the appointed day there comes into existence a charge of an annuity exactly comparable to the old tithe rentcharge as regards the land in respect of which it is charged, subject to the one qualification that the amount will not be the same. It will either be slightly more or slightly less than the rentcharge, but it is to be in respect of the same land as the land on which, originally, tithe rentcharge had been charged.

The next section I need refer to is s. 9. [His Lordship read it.] Those words are obviously wide enough to cover the charge which is created by s. 3. What is to be determined there is the land subject to the old tithe rentcharge and the amount of the new charge. Section 10 provides, among other things, for apportionment. [His Lordship read s. 10, sub-s. 1.]

The language of sub-s. 2 is very significant. Before I examine it a little more carefully I ought to mention that in the interpretation section, s. 47, the word "annuity" is defined as meaning "a redemption annuity charged by "section three of this Act or a substituted annuity." A "substituted annuity" is the same as the annuity charged under s. 10 in respect of an apportionment. It is substituted for the original annuity charged by s. 3. Going back to sub-s. 2 of s. 10, it provides that what it calls the existing annuity shall, on an apportionment being made, be extinguished. It therefore clearly contemplates that at the date of apportionment there is an existing annuity and that existing annuity can only be in a case where you are dealing with an original apportionment, the annuity charged under s. 3. That annuity, therefore, is contemplated as being in existence at the date when the apportionment takes place. It is said that that existing annuity, if it be a charge at all—and I cannot myself see how it is possible to put any meaning on s. 3 unless it is a charge—is nevertheless a charge which only comes in as a convenient piece of machinery, as a stage, so to speak, in ascertaining the effective charge which is only the substituted annuity charged on the individual owners. There again, I cannot follow that. Section 3 in solemn terms states that there is to be a charge for the use of His Majesty, a charge the amount of which is what I may call the global amount ascertained and only ascertainable by reference to the global area in respect of which the old tithe rentcharge was charged. Solemnly to create in favour of His Majesty in such a case a charge under s. 3 which is going to be mere machinery, not for the purpose of securing some payment to His Majesty, but for the purpose of some subsequent operation which will result in an obligation to make payments to His Majesty, is in my opinion an impossible meaning to put on the language of s. 3.

The next section is s. 13, particularly sub-s. 7. [His Lordship read it.] That language clearly contemplates the existence of a piece of land in the ownership of two or more persons, in other words, a piece of land in respect of which the commissioners are ordered under s. 10 to make an apportionment. It is contemplating a situation existing before any such apportionment is made. It is contemplating that one of those owners will have made a payment in respect of an instalment of the annuity. Now what can that mean ? It cannot mean in respect of an instalment of the substituted annuity, because ex hypothesi there has been no apportionment capable of bringing such a substituted annuity into existence. It can only therefore contemplate a payment being made in respect of an instalment of the original annuity charged by s. 3. It is also contemplating that the person who makes the payment will have made the payment " pursuant to this Act " ; that can only mean pursuant to some obligation imposed by this Act or, if you please, pursuant to some permission given by this Act. There is no permission given by this Act to do anything of the kind. The argument of the tithe commission is that there is an obligation imposed on such a person pursuant to the Act, and if he discharges it he is entitled by this sub-s. 7 to claim part of his payments against the other owners. The amount to be paid will be ascertained by the commission in the present state of affairs, they being the appropriate authority at the moment, and they will for that purpose have to make some sort of provisional ad hoc apportionment of the amount among the different owners so as to give effect to sub-s. 7.

I cannot make the language of sub-s. 7 in any way square with the idea that no liability arises to make any payment until an apportionment has been made, or with the idea that the only liability created by the Act is a liability to pay an apportioned sum if and when an apportionment has been made. Down to this point I have found, if I am right, language which quite clearly contemplates (1.) the existence of a charge coming into operation at once, (2.) a liability in respect of that charge, and (3.) a method of extinguishing that charge and bringing into existence in its place a number of charges called substituted annuities, the sort of case we are dealing with.

C. A.

1948

Tithe Redemption Commission v. Brown.

Lord Greene M.R.

That brings me to s. 16, sub-s. 1, which appears to me to put the final brick on that structure. [His Lordship read it.] That is contemplating that an annuity, whether an original one which comes into existence under s. 3 or a substituted one which comes into existence on apportionment, shall be an effective charge in the sense that it is going to create a debt in favour of His Majesty. According to the argument, the original annuity in this case did not become a debt due to His Majesty in spite of the fact that by s. 3 it was brought into existence as a charge for the use of His Majesty. But the language is most significant when I come to these words, " a debt due to His Majesty from " the person who is on that date the owner of any land in " respect of which the annuity is charged." That takes me back to s. 3. What happened under s. 3, as I have pointed out in the example that I took of Whiteacre, which is owned by three people at the date when the Act comes into operation, is that it is charged with rentcharge, and on Whiteacre there is brought into existence a charge, not " on " Whiteacre, but " in respect of " Whiteacre exactly comparable with the old tithe rentcharge save on the question of amount. Just as in the case of the old tithe rentcharge the whole of it was charged on the whole of the land to which it was originally ascribed and (in the absence of legal apportionment) on every part of it into whoever's ownership the different parts might go, so the whole of the annuity under s. 3 is charged in respect of the totality of the land and equally on every part of the land in the case of separate ownership. The only way of putting an end to that state of affairs is by an apportionment, in other words, each owner of a part is liable for the whole amount unless and until his liability is diminished and limited to a proportionate part of the whole by the creation of a substituted annuity.

In my opinion, having regard to s. 3 and the references there to the old tithe rentcharge, it follows that in the case of an original annuity the phrase " the owner of any land in respect " of which the annuity is charged " means the owner of any part of the land in respect of which a global annuity is charged for the very simple reason that the global annuity charged by s. 3 is charged in respect of the whole of the land irrespective of the fact that until an apportionment is made there are several owners who, in the meanwhile, will each be liable for the whole. The phrase " any land " appears to me to be exactly consistent with the language of s. 3 and with the other matters to which I have referred. Particularly, perhaps, I may join it up with the language which I have already considered of sub-s. 7 of s. 13. As I have said, the second reason given by the learned judge for rejecting the redemption claim was based on the view which I have respectfully said was the wrong view, namely, that before anything can be done there must be an apportionment; the two consequences of that proposition were that there could be here no compulsory redemption and no suit to recover arrears of the full amount of the original annuity. That is, in my opinion, misconstruing the Act. All that we are concerned with is to deal with the facts in support of the particular matter which is appealed, namely, the annuity. In my opinion, the present claim in respect of the annuity should succeed. What the actual amount will be we have not had to consider, but that no doubt is known or will be agreed.

In the result, therefore, the appeal must be allowed and the appropriate order made.

SOMERVELL L.J. I agree, and there are very few observations which I wish to add. I agree with what has been already said by the Master of the Rolls in his examination of the various sections of the Act. He referred to the position, and this was common ground in the argument, which existed before the Act when tithe rentcharge under the old Act was in operation. At that time, and in those days, there is no dispute that if an area on which tithe rentcharge was charged came into the hands of different owners and there was more than one owner of such an area, each owner could be sued by the tithe owner for the full amount of the tithe rentcharge on the whole area. When Parliament came to legislate it might have done, of course, what Mr. Jukes submitted it has done. It might have said: "These are things which it is desirable to abolish "and in the future no owner of part shall be responsible for "the whole. Where the new annuity," to be determined in the way which has been explained by the Master of the Rolls, "covers an area in more hands than one, then there shall be "no liability until the machinery of apportionment has been "applied and each person made responsible for his appropriate "part of the whole annuity." If Parliament had done that, I think the first thing that one would have expected to find would have been that the apportioned amount when apportioned would be retrospective, and would date back to the day from which the new annuity replaced the old tithe rentcharge or to the date at which the ownership was divided. Unless

C. A.

1948

TITHE REDEMPTION COMMISSION v. BROWN.

Somervell L J.

this was done, in cases in which there was more than one owner there would have been a gap when those concerned would have been wholly free from any liability and the Crown in respect of that land would have collected nothing until there had been time for the apportionment to be completed. So far from that being the case, in the words which have been already read, the apportionment is to take effect from the date of the apportionment, and what is called the existing annuity is deemed to be extinguished as from that date. The matter does not rest there, and I do not want to go into all the points referred to by the Master of the Rolls with whose judgment I agree.

I will mention shortly the points which seem to me to be conclusive on this matter. First of all, I think that s. 16, sub-s. 1, is framed so as expressly to preserve the liability of an owner of part for the whole in respect of annuities, which was applicable at the time of tithe rentcharge. The other point is the existence of s. 13, sub-s. 7, and I do not wish to add anything to what has been said on that point. The learned judge based his whole conclusion upon the word "shall" in the apportionment section, s. 10, sub-s. 1. Whether or not the existence of that word in the form in which that sub-section is framed might in certain circumstances give someone in the position of the respondent here a right to mandamus the commission, is a matter which does not arise in this appeal and on which I express no opinion, but I am quite clear in my own mind that one cannot from the form, referred to by the learned judge as the mandatory form of that sub-section, draw the inference, which seems to me to be contradicted by so many other provisions of the Act, that it is to be a condition precedent to any liability where there is more than one owner of a tithe area.

ROXBURGH J. I agree.

Appeal allowed.

Solicitors: *Official Solicitor to the Tithe Redemption Commission*; *Beaumont, Son & Rigden.*

J. W. H.

Followed. MUNRO *v.* WILLMOTT. [1949] 1 K. B. 295

SACHS *v.* MIKLOS AND OTHERS

C. A.

1947
Dec. 15, 16, 17.

Lord Goddard C.J., Tucker L.J. and Jenkins J.

Bailor and bailee — Conversion — Detinue — Measure of damages — Gratuitous bailment of furniture—Bailee unable to find bailor—Sale of furniture—No agency of necessity—Rise in value of furniture after sale—Liability.

In 1940 the owner of certain furniture was allowed by the first defendants to store it free of charge in their house. Thereafter those defendants lost touch with the plaintiff through the latter's failure to keep them informed of his whereabouts. In 1943, the first defendants required the space taken up by the furniture, and wrote two letters to the plaintiff at an address supplied by his bank. They received no reply and their letters were not returned. They also attempted, without success, to reach him by telephone. Deciding that they would no longer keep the furniture, the first defendants handed it to the second defendants, a firm of auctioneers, who duly sold it at auction for 15*l.* In 1946, the plaintiff demanded the furniture from the first defendants, who tendered the 15*l.* As the value of furniture had meanwhile risen greatly, the plaintiff brought an action for conversion and detinue, claiming damages on the basis of the increase in value. The county court judge found that the first defendants had made every reasonable effort to trace the plaintiff and that they were thereupon entitled as agents of necessity to sell the goods. He did not find whether the first defendants' letters written to the plaintiff in 1943 were received by him. On appeal by the plaintiff,

Held, that those facts gave rise to no agency of necessity since they exhibited nothing in the nature of an emergency compelling the first defendants to sell the furniture; that the first defendants were therefore not entitled to sell and that all the defendants were consequently guilty of conversion; that if the plaintiff received the first defendants' letters in 1943 he then knew, or ought to have known, that the furniture would be sold if he did not collect it, and was through his inaction himself the cause of his loss; that if, on the other hand, he did not receive those letters, he was entitled to damages in respect of the increase in the value of the furniture between the dates of the sale and of his discovery of it; and that the case must be remitted to the county court judge for the necessary finding and for assessment of damages accordingly.

Rosenthal v. *Alderton & Sons Ld.* [1946] K. B. 374 distinguished.

APPEAL from West London county court.

In 1940 the defendant Mrs. Miklos consented to store in her house furniture belonging to the plaintiff, without making any charge for that service. She handed the plaintiff a document signed by her acknowledging that she was keeping free of

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

charge the effects set out in a schedule. Shortly afterwards she married the defendant Miklos. For a time the plaintiff used to visit the defendants, who continued to reside in Mrs. Miklos' house. Thereafter the plaintiff ceased visiting them and never communicated with them, or kept them informed of his address. In 1943, the defendants Miklos required the room in which the furniture was stored. They obtained from the plaintiff's bank manager an address where he might be found, wrote to him twice, and attempted more than once to communicate with him by telephone. As they received no reply to their letters, and the letters were not returned to them, and as their efforts at telephonic communication had failed, the defendants Miklos sent the furniture to the second defendants, a firm of auctioneers, who sold it for 15*l.* In 1946 the plaintiff demanded the return of his furniture and brought this action claiming damages on the basis of its greatly increased value. The defendants Miklos brought the 15*l.* into court. The county court judge, while finding that the defendants Miklos had made every effort to trace the plaintiff, did not find as a fact whether or not he received the two letters which they had written to him. He held that the first defendants became agents of necessity in the circumstances and therefore had implied authority to sell the furniture, and he gave judgment for all the defendants. The plaintiff appealed.

Goodenday for the plaintiff. The county court judge has decided that the defendants Miklos were entitled to sell the furniture as agents of necessity. It is submitted that no such agency arose or could arise. If it could arise, when was it to be said to do so? It must arise at some time, yet it appears quite uncertain when, whether at the end of six months or of one year. If A leaves his property with B, it cannot surely be that at some time, arbitrarily decided on by B, an agency of necessity to dispose of the goods arises.

[Lord Goddard C.J. How long does the duty of a gratuitous bailee continue?]

The plaintiff bases his case not on a bailee's positive duty, but on his negative duty not to convert another person's property, whatever the capacity in which he holds it. The only way in which the sale of another person's property can be justified in circumstances like those existing here is by invoking the doctrine of agency of necessity. Any extension of the power of a person to sell the property of another is dangerous. Five conditions must be fulfilled before an agency of necessity can arise: (1.) There must be a real and immediate urgency for sale of the goods; (2.) there must be no course besides sale reasonably open to the bailee; (3.) the bailee must be acting in order to preserve the interests of the owner; (4.) it must be impossible to communicate with the owner so as to obtain his instructions; and (5.) at the time of the sale the bailee must purport to be acting as an agent of necessity. There was no urgency here save that created by the defendants Miklos in deciding that they wanted the room taken up by the plaintiff's furniture. They were not having to leave their house; they were merely getting rid of an inconvenience. Other courses were open to those defendants. It may be that inconvenience would attach to any of them, but a person must expect inconvenience if he accepts custody of the property of another. They could have stored the furniture, which would have been their security for storage costs. They could have brought an action to restrain the plaintiff from leaving his furniture with them any longer.

[TUCKER L.J. Will it determine a bailment merely to write a letter to the last-known address of the bailor?]

It is submitted, yes. R. S. C. Or. 50, r. 2, is applicable even though in aid of proceedings of a different character from the present.

[TUCKER L.J. What is the position after determination of the bailment?]

The bailee can then hold the bailor liable in trespass, can bring an action for damages, and can direct the sheriff to execute on the goods.

[TUCKER L.J. The plaintiff says that this bailment was determined in a wrongful way. Is there any proper way in which it could have been done?]

Yes; receipt by the plaintiff of the two letters which the defendants Miklos say that they sent to him might have been sufficient for that purpose. There could never be any agency of necessity unless the bailment had been determined; but, even if the bailment here was determined, no agency of necessity could arise in the circumstances of this case.

[LORD GODDARD C.J. Suppose that the bailment has been determined and that the bailee is entitled to rid himself of the goods, may it not be better for him to sell them rather than, say, put them out in a field to rot? The court may have to consider whether the bailee has ridded himself of the goods in a reasonable way.]

Even in such a case the bailor would not be an agent of necessity. If he wishes to rid himself of the goods there and then, he ought to invoke the assistance of the court.

[TUCKER L.J. The question is how the defendants Miklos were to determine this bailment, not only how they were to act as bailees.]

They could have applied to the court for a declaration that the bailment was at an end. They could have divested themselves of the goods by asking the court to take charge of them under R. S. C. Or. 50. They cannot take it upon themselves to sell them in the open market, specially in conditions which are abnormal, as, for example, in time of war. The third condition, that the agent of necessity must be acting to preserve the interest of the owner of the goods, is not fulfilled by acting and then saying that the effect of the action was to preserve that interest. He must be actuated throughout by the motive, and the defendants Miklos do not suggest that that was their motive in selling the furniture. As for cond. (4.), there was no impossibility here of communication with the plaintiff. As for cond. (5.), the person in possession of the goods need not necessarily state in terms to those concerned in the sale that he is acting as agent of necessity for the owner, but all the relevant considerations must be present to his mind and actuating him. To discharge his agency must be his overriding purpose in selling the goods. If he is selling the goods in order to help himself, he is fulfilling neither cond. (3.) nor cond. (4.). Reverting to the necessary impossibility of communicating with the bailor, it is submitted that it was the duty of the defendants Miklos to visit the address at which, they had been told, they might reach the plaintiff. [*Springer* v. *Great Western Railway Co.* (1) referred to.] McCardie J.'s judgment in *Prager* v. *Blatspiel, Stamp & Heacock Ld.* (2) is in the plaintiff's favour. The county court judge thought otherwise. McCardie J. (3) said in effect that if a bailee was in a position to place the goods in store and did not determine the bailment it was his duty to place them in store whether or not he incurred expense thereby.

[JENKINS J. In that case there was a commercial agent who had an expenses account.]

---

(1) [1921] 1 K. B. 257, 266.
(2) [1924] 1 K. B. 566.
(3) Ibid. 573.

Great Northern Ry. Co. v. *Swaffield* (1) is an example of an agent's finding himself in a position not contemplated when the goods were entrusted to him. An agent in those circumstances can recover his costs. The defendants Miklos could have retained the goods or stored them, and to that extent *Prager's* case (2) is in the plaintiff's favour. The defendants Miklos were in a much better position with regard to the goods than were the railway company in *Great Northern Ry. Co.* v. *Swaffield* (1), as that company had no facilities for storing horses, whereas these defendants had the alternatives of keeping or storing the furniture. [*Jebara* v. *Ottoman Bank* (3) referred to.]

[TUCKER L.J. The condition that the agent of necessity must purport to act as such is fulfilled if, on the facts, he must be so acting. It is not necessary for him to tell those to whom he sells the goods that he is so acting.]

If the state of mind of the person selling the goods is that he is doing so to rid himself of an inconvenience then he cannot be selling as of necessity. [Judgment of Scrutton L.J. in *Jebara* v. *Ottoman Bank* (4) referred to.] It is submitted that on the authorities it is clear that there cannot have been an agency of necessity here. The only condition of the five which the defendants Miklos can possibly be said to have fulfilled is that of the impossibility of communicating with the plaintiff. On the evidence, they have not established even that.

As for the measure of damages, the damages cannot be less in conversion than in detinue. *Rosenthal* v. *Alderton & Sons Ld.* (5) applies, and the value of the goods should be taken as at the date of the action.

[He was stopped.]

Hogg for the defendants Miklos. This was a naked bailment, without terms of any kind save that it was to be for what the county court judge called "a short while." The plaintiff, having left the goods with the defendants Miklos, then proceeds, after a few visits, to go away and refuse to answer various communications sent to him. The county court judge never found as a fact whether or not the letters were received by the plaintiff. The defendants' argument, therefore, is based on the assumption that that matter was not decided one way or the other. Those being the facts, what were the bailees to do ?

(1) (1874) L. R. 9 Ex. 132.
(2) [1924] 1 K. B. 566.
(3) [1927] 2 K. B. 254, 264.
(4) Ibid. 270.
(5) [1946] K. B. 374.

The question is whether circumstances can arise in which, when all else fails, a bailee can sell the bailor's goods. This case can be brought within the four corners of the cases on agency of necessity. The defendants Miklos have to show that in law circumstances can arise, and have arisen on the county court judge's findings, in which a gratuitous bailee may sell the bailor's goods—when every attempt to get him to retake them has failed. The question is whether it is reasonable that a relationship should be implied by law or in fact between bailor and gratuitous bailee permitting the latter to sell in those circumstances.

[LORD GODDARD C.J. An implied authority to sell would mean that there was an agency of necessity.]

Not in every case in which the court has held that there was authority to sell was there on that account an agency of necessity. Agency of necessity is a term of art, but it may be used in various cases where one man is authorized to sell the goods on behalf of another. An example is where the master of a ship hypothecates the ship or her cargo Such cases are obviously not analogous with the present case, but it is surely reasonable that the law should imply into the relationship of bailor and bailee a term granting the bailee the right in extreme circumstances to sell the goods bailed. It is perhaps unfortunate that the expression agent of necessity should have been used. There appears to be no authority in point, but there must, surely, be circumstances in which a sale of a bailor's goods by a bailee is justified. The county court judge's judgment is incontrovertible in common sense. The defendants Miklos as bailees have been found to have done everything they could, having written twice, sent a message through the bailor's bank manager, and several times telephoned to the number given to them. Whether or not another county court judge might have found that there was anything else that they could have done does not concern these defendants. The court, it is submitted, is bound here by the judge's finding that the defendant bailees did everything that it was reasonable for them to do. Three courses only were open to the defendants Miklos : they could keep the furniture, they could store it, or they could sell it ; for they could not simply turn it out. Of the three courses they took the reasonable one. [Judgment of McCardie J., referring to Storey on Agency (9th ed.), in *Prager* v. *Blatspiel, Stamp & Heacock Ld.* (1) referred to.] The circumstances here justified the bailees in assuming extraordinary powers which would not have been conferred in an ordinary bailment. The whole of the facts of this case, by their peculiar nature, are a complete safeguard against abuse by the bailee of any ordinary bailment.

---

(1) [1924] 1 K. B. 571.

[LORD GODDARD C.J. If these bailees acted for their own convenience, the question of necessity cannot arise.]

It is submitted that on these facts necessity did arise. The fact that a bailee would be entitled, in such circumstances as these, to turn the goods out into his field where they would deteriorate shows that there must exist the more limited right to sell them in order to preserve their value. If the law permits the one, it must permit the other. The mere fact that the emergency arises as a result of something that the bailee has decided to do does not make it wrong for him to sell the goods, provided that what he has decided to do is lawful in itself. These bailees decided that they must determine the bailment, and that decision created the emergency which entitled them to act as they did.

[LORD GODDARD C.J. Is there an emergency merely because these bailees no longer want to keep the furniture? It is not as though the house, say, had been rendered uninhabitable by a bomb.]

It is none the less an emergency because it arises out of a decision which the bailees were entitled to make. Their duty, then, is to do their best to communicate with the bailor in order to obtain his authority to act. It is suggested for the plaintiff that *Prager* v. *Blatspiel, Stamp & Heacock, Ld.* (1) which, by analogy, covers this case, is no longer good law in the light of Scrutton L.J.'s judgment in *Jebara* v. *Ottoman Bank* (2); but there was here only one reasonable business course open to the defendant bailees after failure of their efforts to communicate with the owner.

[LORD GODDARD C.J. Does not Scrutton L.J. suggest in *Jebara* v. *Ottoman Bank* (2) that the doctrine of agency of necessity has been extended as far as it will go?]

It is submitted not, because that would make his judgment in that case inconsistent with earlier decisions of his own.

[LORD GODDARD C.J. If on a gratuitous bailment the bailor disappeared and answered no letters, the court might be justified in inferring that the bailor had abandoned his property in the goods. If there were facts to justify a finding of abandonment,

(1) [1924] 1 K. B. 566.

(2) [1927] 2 K. B. 270, 271.

the bailee would acquire property in the goods and could pass a good title to a purchaser.]

If the right inference from the facts was that the plaintiff had abandoned his property in the furniture, then the defendant bailees were entitled to sell them whatever they thought about the matter. [Storey on Agency, 9th ed., s. 141 referred to.] The county court judge was right in finding that there was authority, actual or implied, in the defendant bailees to sell here. It is submitted that there was actual authority, whether or not it be called an agency of necessity.

The question next arises as at what date the goods are to be valued, assuming that the sale was wrongful. The sale took place in July, 1944, when the goods were worth 15*l.* That, it is submitted, is the measure of their value to be taken. *Rosenthal* v. *Alderton & Sons, Ld.* (1) is distinguishable. This is a pure action of trover, based upon a sale after the bailees had done everything in their power to determine the bailment. In such a case the measure of damage, despite *Rosenthal* v. *Alderton & Sons, Ld.* (1), is the value of the goods at the date of their conversion and not at the date of judgment or of demand and refusal. The law is confused on this point, and the authorities are conflicting. Three text books all give a different account of the matter. In Salmond on Torts (10th ed.), p. 309, the author refers to the value recoverable as being in general the value of the goods as at the date of their conversion. In Winfield on Torts (3rd ed.), pp. 362, 363, s. 111, the same question is treated in a different way. In Mayne on Damages (11th ed.), p. 416, the point of time at which the damages are to be assessed is said to be a question for the jury. The headnote to *Rosenthal* v. *Alderton & Sons, Ld.* (1) makes it look as though this point had been decided against the defendants here, but it is submitted that that is not the case.

[TUCKER L.J. That was a claim in detinue, not conversion.]

That is the difference between that case and this. There the bailment had been determined by the wrongful act of the defendants, and the court held them not entitled to rely on their own wrongful act in order to minimize the damages.

[LORD GODDARD C.J. There the bailor had never done anything in breach of the terms on which the goods had been deposited. It might perhaps be said in the present case that the bailor, by putting himself beyond the reach of the bailees

(1) [1946] K. B. 374.

who want to determine the bailment, has done something which he had impliedly promised not to do.]

That expresses the argument of the defendant bailees here. In *Hiort* v. *Bott* (1) Cleasby B., expressing the same point of view as Bramwell B. in that case, puts in a single passage at the end of the second paragraph of his judgment the proposition here contended for. If the bailees were entitled, by reason of the plaintiff's conduct, to take some action, their right should not be limited to storing the goods. It must be extended to cover any action which is reasonable in the circumstances.

[LORD GODDARD C.J. Has it ever been suggested that any kind of a bailee has a right to sell the bailor's property ?]

There seems to be no case showing such a right. The point has never before arisen for decision. An authority to sell where to do so is reasonable would seem to be implied in the very relationship of bailor and bailee. There must surely be such an authority. The situation would otherwise be absurd. The plaintiff says that the defendant bailees ought to have stored the furniture. That, surely, by itself shows that the defendants had implied authority from him to act reasonably. Once that premiss is granted, it follows that in a suitable case the bailee must also have authority to sell.

[LORD GODDARD C.J. Will there not, if that is so, be a similar authority in every case where a person holds goods on which he has a lien ?]

The case of a lien is different.

[LORD GODDARD C.J. If an action of detinue would lie here, the fact that the bailees had parted with possession of the goods previously would be no answer ?]

No, but here the bailment had been determined at the time when the wrongful act took place, whether a wrongful sale or a demand and refusal.

[LORD GODDARD C.J. If a bailee decides that he will no longer hold the goods, but fails to find the bailee in order to tell him so, can he be in any better position than any other person into whose hands the property of another comes, or be entitled to do any wrongful act in relation to the property? And why cannot the bailor sue him in detinue when he fails to deliver up the goods on demand ?]

Whether he can or not, the substantive wrongful act took place as at the date of the sale of the goods and not as at the date of the demand and refusal.

---

(1) (1874) L. R. 9 Ex. 86, 91.

[LORD GODDARD C.J. Were these goods not entrusted to the bailees on the terms of a document ?]

That document was no contract, and placed the defendants Miklos in no different position from that of gratuitous bailees.

[JENKINS J. But still, the goods were entrusted to them ?]

The terms of a gratuitous bailment are always the same, namely, to keep the goods and return them when asked for. The county court judge has found that the bailment here was expressed to be for a short time. The bailment, it is submitted, had been brought to an end before the sale took place. It was not necessary, the bailees having made all reasonable attempts to do so, for them to prove affirmatively that they had succeeded in bringing their intention to the bailor's mind. The authorities go no further than to say that a bailor can sue a bailee for detinue in respect of goods though the bailee has lost them. There is, however, no authority for the proposition that, where a wrongful act has been committed in all innocence in 1944, it can be made to have been committed constructively at a much latter date simply by writing a letter demanding the return of goods which the bailor knows to be no longer in the bailee's possession. If a man wrongfully sells my shares in 1941, I cannot sue him in detinue for them in 1947.

[LORD GODDARD C.J. Would it not depend on whether the owner of the goods knew of the conversion ? If a man deposits stock with his bank and later, the price having risen, asks for the stock in order to sell it and finds that the bank sold it three years before when the prices were low, surely the loss sustained is that which emerges on his discovery of the facts ?]

Assuming that to be the case, the measure of damages in tort in general depends on the date of the wrongful act, subject to any special damage accruing thereafter.

[LORD GODDARD C.J. This is a question not of constructive commission of an act at a later date, but of what loss the plaintiff has suffered.]

That does not necessarily depend on the time when he knew of the conversion. The principle is stated by Lord Ellenborough in *Mercer* v. *Jones* (1) : the date to take here is that of the tort itself, and not the date when the damage has subsequently accrued, for this is not a case in detinue. The proposition that the extent of the damage is to be determined by the date when the bailor comes to know that the goods are missing flies in the face of *Mercer* v. *Jones* (1). [*Greening* v.

---

(1) (1813) 3 Camp. 477.

Wilkinson (1) referred to.] In certain circumstances some special damage may arise in cases of conversion.

[TUCKER L.J. *Rosenthal* v. *Alderton & Sons, Ld.* (2), although deciding that the value of the goods must be taken at the date of the action, leaves entirely open the question what damage the plaintiff may have suffered; and even if the present case can be distinguished from that case, and the value of the goods is taken as at the date of conversion, the question of actual damage remains and may to some extent depend on the state of the plaintiff's knowledge].

An alternative way of putting the defendant bailees' case is this: If it be true that the damage suffered is that which flows naturally from the tortious act, it does not follow that in this case the plaintiff will be entitled to damages on the basis of the increase in value of the furniture. The proved facts are that he left his goods for some years without making the slightest effort to see what had become of them, and that he did so after he had messages from the defendants Miklos urging him to communicate with them. If as a result of that conduct the furniture becomes lost or the defendant bailees have acted wrongfully, it may be left to a jury to decide that the damage which resulted, in so far as it resulted from an increase in the value of the goods, did not flow from the defendants' act at all. This bailment for an indefinite period—for a short time as the county court judge has found—must have been limited in some reasonable way. It must be deemed to have come to an end within some reasonable period, which in this case has elapsed.

Malcolm Wright for the defendant auctioneers. These defendants are content to adopt the argument presented for the defendant bailees. As for the measure of damages, the auctioneers are sued only in conversion. The governing principle is that it is necessary to discover what damage the plaintiff has suffered as the natural and probable consequence of the defendant's act. Prima facie, in a case like this, the measure of damages as against the auctioneers must be the value of the goods at the date of the conversion, and the statement in Winfield on Torts (3rd ed.), p. 363, is adopted for the purpose of this argument.

Goodenday in reply. The defendants Miklos are contending that they were agents of necessity when they sold the furniture. They cannot, therefore, also contend that the bailment had determined, for, whatever other ingredients are necessary to an agency of necessity, the agent must at least be the bailee of the goods. The action in detinue was accordingly maintainable, and *Rosenthal* v. *R. Alderton & Sons, Ld.* (1) applies with regard to the measure of damages. The measure of damages is in any event the same whether the action be in detinue or in conversion, for, as a matter of history, a declaration in trover was simply a variant of a declaration in detinue having the object of remedying certain defects in the earlier form of action. Finally, the measure of damages ought to be the full value of the goods as at the date of judgment whether or not the plaintiff in fact received the letters sent to him by the defendant bailees, for the threat, contained in those letters, to sell the furniture was a threat to commit a tort. The plaintiff was not bound to bring an action in trover until he had heard that the furniture had actually been sold. Until then he was entitled to assume that the wrong had not been committed. [Counsel was not called on to reply on the question of agency of necessity.]

---

(1) (1825) 1 C. & P. 625.

(2) [1946] K. B. 374.

LORD GODDARD C.J. This action appears to be a warning against doing a friendly act. Its moral is: never do anything for anybody when asked without going to solicitors and having a formal agreement drawn up. The defendants Miklos were rendering a friendly service to the plaintiff, who acted in a way which seems to me to have been quite extraordinary, and to some extent unreasonable, with the result that these defendants are in any case landed in expensive, protracted, and difficult proceedings, and may yet find themselves saddled with no inconsiderable liability.

There was no reason at all why the defendants Miklos should go on keeping the plaintiff's furniture. They certainly appear to have done their best to communicate with him. I cannot agree with the contention of his counsel that they were under any duty to hunt London for him and make elaborate inquiries. The ordinary way for a person in South Kensington to communicate with a man in the north of London is to write; and if the defendants Miklos wrote and received neither their letters back nor an answer, and if on telephoning they could obtain no information as to his whereabouts, the natural inference for them to draw was that if they went personally they would not find him.

Thereupon the defendants Miklos did what most people in those circumstances would have done: they decided that they would not keep the furniture any longer, and, as they could not turn it out into the street because that would cause an obstruction, they sent it to the defendant auctioneers to be sold at auction. That was the most natural thing to do, and in peace-time such a course would probably have landed them in no real liability, for if the market value of the furniture had been obtained and had remained constant they would have had an adequate sum to hand to the plaintiff. The question arises, however, whether they had any legal right to sell that furniture. The main contention below and, indeed, here, and the judge so held, was that the defendants Miklos became agents of necessity in the circumstances and, therefore, had an implied authority to sell. Mr. Goodenday for the plaintiff, has satisfied me that they cannot possibly be held to be agents of necessity. Agents of necessity, until very modern times, were confined to two classes of person: (1.) those who accepted bills of exchange for the honour of the drawer; and (2.) masters of ships who found themselves in foreign parts and unable to obtain immediate instructions from their owners when they needed money for expenses which had not been provided for. The master then always had power to sell or hypothecate the ship, in some cases to dispose of the cargo, and so forth, as an agent of necessity. Indeed, as recently as 1895 Lord Esher M.R. in *Gwilliam* v. *Twist* (1) expressed considerable doubt whether it was possible to enlarge the classes of persons who could be regarded in any circumstances as agents of necessity. The courts have not, however, found any difficulty in applying this doctrine of agency of necessity where a necessity, which means an emergency, arises in the case of a carrier by land. There is no reason why, if it becomes commercially impossible, or extraordinarily difficult, for example, in the case of a strike or other breakdown of communications, for a carrier to communicate with the owner of goods, he should not be entitled to sell or dispose of them in the same way as a master of a ship. I know, however, of no case in which the doctrine of agency of necessity has been applied to carriers by land except where the goods are perishable or in a somewhat similar category, that is to say, livestock, which have to be tended, fed and watered. If a carrier cannot obtain instructions from the owner or consignee of livestock, he has the animals on his hands and may find himself in difficulties with the criminal law for cruelty to animals if he neglects to feed or water them. He would, therefore, have power to provide for fodder and, very likely, the stabling of the animals, and be able to recover the cost from the owner or whoever entrusted the animals to him. In the same way, if he finds that he has on his hands a quantity of perishable goods, such as fruit, which he cannot deliver owing to strikes or other causes, he may, acting in the interest of the owner as well as of himself, sell the goods, like the master of a ship, in such an emergency. It is, however, fairly clear from Scrutton L.J.'s judgment in *Jebara* v. *Ottoman Bank* (1), and it is certainly my opinion, that the court should be slow to increase the classes of those who can be looked upon as agents of necessity in selling or disposing of other people's goods without the authority of the owners. It is certain that those who have been held entitled to act under this doctrine of agency of necessity have never been so held unless there was a real emergency.

---

(1) [1946] K. B. 374.

---

(1) [1895] 2 Q. B. 84.

In this particular case, whatever else there may have been, there was certainly no emergency. It was not a case where the house had been destroyed and the furniture left exposed to thieves and the weather. There was nothing perishable here in the sense in which that term is used when applied to goods. The position was that the defendants Miklos—and small blame to them—wished to be rid of this furniture which they were storing as a mere act of courtesy and friendship, as to which the plaintiff showed no anxiety or intention, at that time, to have it back, and which was in their way. Their house was their means of livelihood, through the letting of lodgings or taking in of boarders, and naturally they wanted as much space as possible. If they were not entitled to sell as agents of necessity, then, however hard it may be on them, I cannot avoid the conclusion that, in sending the property to the auctioneers to sell, they were guilty of conversion. They were selling the plaintiff's property without his authority.

It is here that I pause to say that I am afraid that this case must go back to the county court judge because, although he has found that the defendants Miklos sent letters to the plaintiff as well as telephoning to him, he has not found whether the plaintiff received the communications. These defendants, he finds, proved the posting. I assume that he is satisfied that the letters have not been returned. It may not be a very long step to finding that the plaintiff received the letters; I do not

(1) [1927] 2 K. B. 254, 270.

C. A.

1947

SACHS
v.
MIKLOS.

Lord Goddard
C.J.

know. It is fair to the plaintiff to say that, according to the defendant Mrs. Miklos herself, he appeared to be considerably surprised, when he called on her early in 1946, eighteen months after the furniture had been sold, to hear that that had happened. On the other hand, it is very remarkable that, if those letters were sent, as the judge has found that they were, they were never received. That is a matter which, for two reasons which I will explain later, makes it necessary, in my opinion, for the case to go back to the judge. We cannot find that fact for him.

The importance of it is this: I am not, and I hope that it will not be thought that I am, here indicating any opinion as to the way in which the judge should decide any questions of fact which will be for him at the further hearing. I only make this comment : If a gratuitous bailee writes to the bailor that he is no longer willing to hold his property, and asks him to remove it, and the bailor makes no answer and takes no step; and if that letter is followed up by another, which the bailor receives, saying that, as the bailor has not answered the bailee's letter or taken any steps to remove his property, he, the bailee, will sell it if the bailor does not remove it or say what is to be done with it, and again there is no answer, then a court may possibly infer that the bailor was so disinterested in it that he was impliedly assenting to the sale. There are certain difficulties in the way of such a finding because of the doctrine, applicable at any rate with regard to offer and acceptance, particularly in respect of contract, that silence does not give consent. I only say that that is a possible view, although, for the reasons which I shall develop later, I think that the question of receipt or non-receipt of these letters has a much more important bearing on the question of the measure of damages. So far as the sale or the sending of the goods for sale is concerned, much as I sympathize with the position in which the defendants found themselves with this furniture on their hands and an owner who would not take any notice of it or give any directions in respect of it, I feel constrained to hold that their action did amount to a conversion. I can find nothing in either the pleadings or the arguments addressed to us which affords a justification for the sale. It follows that the second defendants, the auctioneers, are also guilty of conversion. That is one of the risks of their profession. Every auctioneer knows that he takes the risk of being found guilty of conversion for having sold property which turns out not to be the property of his client. As Mr. Goodenday, in his argument, pointed out, the result of this sale, unless the plaintiff were a consenting party to it, would be to pass no title to anybody. The title to the property, of course, would always remain in the plaintiff, who would be entitled to follow it and demand it back. He cannot do that, however, if his claim is satisfied by damages.

I come, therefore, to the question of the measure of damage. That question did appear to present some difficulties, and I do not think that it can be satisfactorily determined until the county court judge has given his decision—has found whether these letters were received. We are proposing to send the case back to the county court judge to find that fact and then to apply his mind to certain considerations which would flow from that in fixing the damages. The goods realized 15*l.* in July, 1944, which was reduced by commission, and so on, to something over 13*l.* net. At that time prices for furniture were exceedingly depressed owing to the flying bombs and the persistence of the war. Immediately after the restoration of peace, when the public were desperately anxious for furniture and none was being made, the prices of second-hand furniture increased enormously, and the plaintiff's furniture has been found by the judge to be now of the value of no less than 115*l.*, very nearly ten times what it was in July, 1944. The question is whether the defendants are liable for the difference, for the auctioneers, whatever their rights or remedies against their clients, the defendants Miklos, are liable to the plaintiff as being guilty of the technical conversion of his property which they have sold without his authority. Mr. Goodenday has relied principally on a recent case in this court *Rosenthal* v. *Alderton & Sons, Ld.* (1). What that case lays down is, I think, correctly stated in the headnote; "In an action of detinue, "the value of the goods to be paid by the defendant to the "plaintiff in the event of the defendant failing to return the "goods to the plaintiff must be assessed as at the date of the "verdict or judgment in his favour and not at that of the "defendant's refusal to return the goods, and the same "principle applies whether the defendant has converted the "goods by selling them or has refused to return them for some "other reason." That headnote very fairly states the decision in that case and says, and in my opinion rightly, that the measure of damages is the same in conversion as it is in detinue where the facts are only that the defendant has the goods in his possession and could hand them over but would not. There is, however, one great distinction, I think, speaking for myself, to be drawn between that case and the present. There there was no question of the defendant's wanting to bring the bailment to an end and doing his best to find the bailor and asking him to remove the goods. The plaintiff there had surrendered his lease to the defendants who had agreed that he should leave his barber's plant and fixtures, of whatever they consisted, on the premises, and that they would take care of them. They did not take care of them; they simply sold them, and when he came back from the war and asked for his property he could not have it. It seems to me that in assessing damages for detinue or for conversion (and, for myself, I do not see where the distinction is to be drawn between those two causes of action for this purpose) the damages are not necessarily and in all cases the value of the goods at the date of judgment. If the action is brought in detinue, the conversion may be inferred from the demand and the refusal to deliver. Not only is that evidence of a conversion, but if a demand by the owner of goods on the person who holds them for delivery to him of them is not complied with, the non-compliance presumes a conversion; I refer to the authorities which are set out in Bullen and Leake's Precedents of Pleadings (9th ed.), p. 351, for that proposition. Although, no doubt, the presumption might be rebutted, prima facie, at any rate, that amounts to a conversion. On the other hand, the conversion in a case where the goods have been sold takes place at an earlier date; namely, when they were sold, so that the conversion took place in this case in July, 1944. The demand for the return of the goods was not made until January, 1946, when the refusal or failure to deliver took place. So the material date in the action for detinue, no doubt, is the date of the refusal, which was in January, 1946. I think that the matter can be clarified in this way without in any way impinging on the decision in *Rosenthal* v. *Alderton & Sons, Ld.* (1). The value of the goods converted, at the time of their conversion, is one thing: we have the figure of 13*l.* odd; but it does not follow that that sum is the measure of the plaintiff's loss. The question is what is the plaintiff's loss, what damage he has suffered, by the wrongful act of the defendants. If that is kept firmly in mind, I think, this case may well

---

(1) [1946] K. B. 374.

(1) [1946] K. B. 374.

C. A.
1947

SACHS
v.
MIKLOS.

Lord Goddard
C.J.

become fairly clear when the county court judge has found, one way or the other, whether the plaintiff received the letters—whether he knew or ought to have known in July, 1944, that if he did not remove the goods the defendants Miklos intended to sell them. If he did have that knowledge, then, it seems to me, this great rise in value which has taken place since is not damage which he can recover as flowing from the wrongful act. If he neither knew nor ought to have known that his goods would be sold, and did not find out that they had been sold until January, 1946, then, it seems to me, however unfortunate it may be for the defendants, it is impossible to say that he is not entitled to recover the value of the goods at that time.

The reason why I say that is this: when he starts his action, or when judgment is given—I care not which—he can and does say that if the defendants Miklos had not committed this tort he would be in possession of property worth 115*l.*; that he has lost most of that 115*l.*; and that they should pay him for that damage. If he knew, or ought to have known, that the goods were going to be sold (I am not impressed by the argument for the plaintiff that he was entitled to assume that the defendants Miklos would not sell when they told him they were going to do so if he did not take his goods away), he is not, in my opinion, entitled to recover more than what the goods fetched at that time, for the damage which he suffered owing to the rise in price is due to his fault in not removing the furniture and not having made his claim straightaway. It was his duty to mitigate the damage; it was also his duty to remove that furniture when he was asked. The fact that he did not remove it may not be a justification for the sale of it; but if he knew that it was being sold he could take action then. If 15*l.* was the market value of the furniture at that time and he could recover that sum, he could replace the furniture with that sum, notionally, at any rate. Therefore, it seems to me that if he knew, or ought to have known, of this conversion in or about July, 1944, the damage which he now says that he has suffered owing to the rise in price is damage for which the defendants are not liable because it has not flowed from their act: it has flowed from his act. What flowed from their act was that the furniture was sold and realized 15*l.* That has been tendered to him or paid into court. He could have had it at the time if he had known. If a man does not know that his property is being sold, so that he cannot intervene and stop the sale, he may, when he does find out, be able to maintain that his property has been disposed of without any authority from or notice to him, and claim damages on the basis of its increase in value. That, in my opinion, is how the measure of damage works out.

The case will be remitted to the county court judge for him to find whether or not those letters were received by the plaintiff or came to his knowledge; and I think that it would also be right for him to say whether or not he accepts the recollection of the defendants Miklos as to their contents. If he finds that they were received, then he has to assess the damages in the light of this judgment on the footing which I have indicated. If, on the other hand, he finds that the letters were not received and that the plaintiff did not know, and ought not to have known, of the sale, then he must assess damages on another footing. He has found that the value of the furniture at the date of his judgment is 115*l*. I am saying nothing about whether he should give leave to amend by extending his jurisdiction to 115*l*.; that is not a matter for this court. He must also, I think, consider this point, although it may make no difference: it is clear that the plaintiff knew of this sale in January, 1946. It is equally clear that he did not begin his action until January, 1947. If the county court judge should find that there has been an undue delay in bringing the action and that the result of that undue delay has been a rise in price between January, 1946 and January, 1947, then allowance must be made. I am not saying that the judge's task is an easy one with regard to the assessment of damages, it never is; but he managed at the first hearing to handle the question of valuation of the particular items. He will, no doubt, consider any further evidence that may be tendered to him on that point.

Therefore, this appeal will be allowed, and a new trial will be ordered on the points which I have mentioned.

TUCKER L.J. I agree. As the case is going back to the county court judge, I do not desire to add any further observations.

JENKINS J. I agree.

Appeal allowed.

Solicitors for the plaintiff: *Alexander Fine, Hawkins & Co.*
Solicitors for the first defendants: *Trower, Still & Keeling.*
Solicitors for the defendant auctioneers: *Macdonald & Stacey.*

1948
Mar. 12.

Denning J.

BOB GUINESS LIMITED *v.* SALOMONSEN.

Gaming — Cause of action — Consideration — Threat to report loser of bet as defaulter—New promise by loser to pay bet—No promise by winner to forbear from reporting as defaulter—Forbearance, in fact, from reporting—Consideration for new promise.

Where the unpaid winner of a bet threatens to report the loser to the National Turf Protection Society as a defaulter, and the loser then promises to pay the bet by instalments, but the winner makes no promise, express or implied, to forbear from reporting the loser as a defaulter, his actual forbearance from reporting the loser, though it constituted the motive which prompted the new promise by the loser to pay the debt, was not the real consideration for such promise, the real consideration being the antecedent debt and nothing else, and the promise is unenforceable.

ACTION.

The plaintiff company, Bob Guiness, Ld., were bookmakers and at the end of 1946 the defendant, Mr. E. Salomonsen, began to place bets with the company and continued to do so. The total account of the company which reached the plaintiff for the week ending January 25, 1947, showed that the defendant owed the company on a betting account 1,303*l.* 0s. 9*d.* On January 28, 1947, a Mr. Silverman, manager of the company's business, called on the defendant and informed him that unless the company received payment they would have to report the defendant to the National Turf Protection Society. The defendant replied: "Don't do that. I am willing to pay, "if you don't report me. I cannot pay all at once, but I am "ready to pay by weekly instalments up to 100*l.* a week." He then gave Mr. Silverman a cheque for 100*l.* The defendant then said he wished to continue betting. Mr. Silverman said that he would take instructions on the proposal and went away. On the same day Mr. Robert Guiness for the company wrote the following letter to the defendant:

"Dear Sir, 1,303*l.* 0s. 9*d.*—18th/25 January, 1947. We "thank you for your cheque value 100*l.* in part payment of the "above account and hereby confirm your promise that settle- "ment of this would be effected by way of weekly instalments "of 100*l.* At your request we have allocated you with another "account number, this being 3220, which number must be "quoted in all communications, written or verbal. At the same "time we take this opportunity of confirming that, at your "request, all future business transacted by you as from to-day "is subject to a limit of 150*l.* daily, which limit will be strictly "adhered to." The letter was sent by hand and the messenger took back the following reply: "28th January, 1947. Dear "Mr. Guiness:—I thank you very much for your letter by "hand and I herewith confirm that I will settle the accounts in "weekly instalments. I have also to thank you for your "consideration and appreciation. Yours faithfully, "E. Salomonsen." The defendant continued betting for some weeks and paid certain sums to the company, in all about 225*l.* In February, 1947, the defendant stopped betting with the company and also ceased paying them. Application was made for the amount then due, 1,649*l.* 0*s.* 3*d.*, but the amount was not paid.

The company brought an action against the defendant for 1,649*l.* 0*s.* 3*d.* on an account stated. This claim was amended by a claim for 1,303*l.* 0*s.* 9*d.* on a contract made between the company and the defendant, that in consideration of the company refraining from reporting the default of the defendant in payment of 1,303*l.* 0*s.* 9*d.* to the National Turf Protection Society, the defendant promised to pay that sum to the plaintiffs by instalments—a promise confirmed by letter. The defendant pleaded the terms of s. 18 of the Gaming Act, 1845, in defence.

Beyfus K.C. and *P. M. Wright* for the plaintiff company. There was here a contract between the company and the defendant that the company would not report the defendant to the National Turf Protection Society for which promise the defendant promised to pay his betting debt at the rate of 100*l.* a week. This was shown by the threat of the company to report the defendant, the subsequent interview between Mr. Silverman and the defendant, the acceptance by Mr. Silverman of the defendant's cheque for 100*l.* and the exchange of letters between the parties, which permitted the defendant to continue credit betting with the company: *Hyams* v. *Stuart King* (1). On January 28, 1947, Mr. Robert Guiness wrote to the defendant that the company confirmed the promise of the defendant that settlement would be effected by way of weekly instalments. That promise was given to avoid the reporting of the defendant to the National Turf Protection Society and so a contract is implied that the company would not report the defendant.

(1) [1908] 2 K. B. 696.

1948

BOB GUINESS LD. v. SALOMONSEN.

Fearnley-Whittingstall for the defendant. There was here no new contract between the parties. There was no undertaking by the company to forbear reporting the defendant to the National Turf Protection Society contained in Mr. Robert Guiness's letter of January 28 to the defendant. Nor can there be any implied promise to refrain from reporting the defendant as a defaulter. If there were any such promise, what was it ? —to refrain from reporting the defendant if he paid the debt and if so, within what period? Would there be a breach if the defendant failed to pay 100*l.* in any particular week ? There was no real consideration here and the new promise was merely to pay the antecedent betting debt for a new motive—the hope that the company would not proceed to report the defendant. See *Hyams* v. *Coombes* (1) and *Poteliakhoff* v. *Teakle* (2).

DENNING J. Apart from authority, this action would appear to be a suit for recovering a sum of money alleged to be won upon a wager and to come within the second part of s. 18 of the Gaming Act, 1845, but an exception has been created by the decision in *Hyams* v. *Stuart King* (3) and the question is whether this case comes within that exception. In cases of this kind, it is necessary to distinguish between a new promise to pay the betting debt and a new contract to pay a sum equal to the amount of the debt. If the transaction upon analysis is nothing more than a new promise to pay the betting debt for a new motive, it will not be enforced, because any action on the promise comes within the terms of s. 18 of the Gaming Act, 1845. If, however, the transaction is a new contract to pay an equivalent sum for a fresh consideration, it will be enforced, because the suit is brought, not to recover the betting debt, but an equivalent sum due under a separate and distinct contract. That is, I think, the principle on which *Hyams* v. *Stuart King* (3) was decided. The decision has been repeatedly criticized. Fletcher Moulton L.J. vigorously dissented from it ; Professor Dicey has subjected it to a searching analysis ; Professor Cheshire and Mr. Fifoot have described it as far from satisfactory ; the Court of Session have labelled it as a peculiar doctrine which does not apply to Scotland ; and Lord Wright has observed, significantly, that it has not yet been considered by the House of Lords. Nevertheless, it is

(1) (1912) 28 T. L. R. 413.

(2) [1938] 2 K. B. 816.

(3) [1908] 2 K. B. 696.

binding on me, and my task is only to ascertain its precise scope. It has been considerably limited by later decisions. At one time, it was assumed that whenever there was, according to legal theory, consideration for a new promise to pay a betting debt, there was a new contract to which the decision in *Hyams* v. *Stuart King* (1) applied, but that assumption no longer holds good. It must be remembered that that which amounts, in legal theory, to consideration, is sometimes a real consideration and sometimes not. Consideration in law is sometimes the real purchase price of a promise, and sometimes it is a mere fiction devised to make a promise enforceable. That was pointed out by the Law Revision Committee in para. 21 of their Report. If there is a real consideration, that is, a new price paid for the new promise, then the promise may be said to be, not a promise to pay the betting debt, but a promise to pay an equivalent sum, and the decision of *Hyams* v. *Stuart King* (1) applies, but if there is no real consideration, and the new promise is nothing more nor less than a new promise to pay the betting debt for a new motive, then the statute prevents its enforcement and the decision of *Hyams* v. *Stuart King* (1) does not apply—see *Hyams* v. *Coombes* (2) and *Poteliakhoff* v. *Teakle* (3). This means that the cases to which *Hyams* v. *Stuart King* (1) applies are rare, because a person who is owed a debt, albeit a debt of honour, is rarely prepared to pay a fresh price for what he considers is already due to him.

In the present case the loser undoubtedly made a new promise. It is contained in writing. The sole question is whether there was a real consideration for it. The way it came about was that the winner threatened that unless he received payment he would report the loser to the National Turf Protection Society. This is a society which assists bookmakers to collect betting debts. It apparently keeps a list of defaulters and the consequences of being put on that list may be not to the liking of a betting man, for he may find no bookmaker ready to accept his bets. The threat to report the loser to that society was nothing more nor less than an inducement to get the loser to pay the betting debt. It was effective. The loser said, "Don't do that," and gave his cheque for 100*l*. and promised to pay the balance by weekly instalments of 100*l*. The winner made no promise to refrain from reporting him.

(1) [1908] 2 K. B. 696.
(2) 28 T. L. R. 413.
(3) [1938] 2 K. B. 816.

The arrangements, so far as they were intended to be binding, were put into writing, but the writing contained no such promise. The letters did not even mention the matter of the society. There was therefore clearly no express promise to refrain from reporting the loser, and I do not see how any such promise could be implied. What would be the terms of any such promise ? To refrain from reporting the loser at any time in the future for any debt ? or only for this debt ? or so long as the instalments were punctually paid ? It is all uncertain. I am quite satisfied that the parties did not intend to create contractual relations between them on this matter. Mr. Beyfus made a significant remark in the course of his argument. He said that, apart from the decision in *Hyams* v. *Stuart King* (1), one could not imagine anything less like a contract than this. But that decision does not make a contract, when there would not otherwise be one. In that case, the majority of the Court of Appeal were able, as I understand it, to find a contractual promise by the winner not to report the loser to Tattersalls. Here there was no contractual promise at all. The threats or inducements made by the winner were no more than representations with no contractual force. There is a well-known rule that representations which induce a contract are not necessarily terms of the contract. Lord Moulton, when delivering judgment in *Heilbut Symons & Co.* v. *Buckleton* (2) points out the distinction. In this case, I am satisfied that, in so far as any terms were arranged which were intended to be contractual, they are contained in the letters. The representations—about reporting to the society—which induced the promise were not in the letters and were not intended to be contractual at all. If the winner, in spite of the loser's promise, had subsequently carried out his threat and reported him to the society, the loser could not have sued him for breach of contract.

The next point to be met, however, is this : the winner did in fact in this case forbear to carry out his threat, and, even though there was no contractual promise by him to forbear, nevertheless it is contended that his subsequent forbearance is, in law, sufficient consideration to enable him to enforce the new promise, and therefore, the decision in *Hyams* v. *Stuart King* (1) applies. In my opinion, however, such forbearance is not a real consideration. Forbearance is, in legal theory, described as consideration so as to conform to the

(1) [1908] 2 K. B. 696.
(2) [1913] A. C. 30, 49–50.

rule that every promise needs consideration to support it, but, as Parker J. pointed out in *Wigan* v. *English and Scottish Law Life Assurance Association* (1), it often arises ex post facto. In such a case it is not a real consideration. Take this present case. The real consideration for the new promise was the antecedent betting debt. The motive which prompted the promise was the desire that the winner should forbear, but motive is not the same thing as consideration. Where there is an admitted antecedent debt, it will usually be found that it is the antecedent debt and not forbearance, which is the real consideration for a new promise to pay it. At one time under the count of indebitatus assumpsit the common law used habitually to enforce promises for which the consideration was an antecedent debt or liability (see the notes to Smith's Leading Cases (13th ed.), vol. I., at pp. 153–4, 635-6), and it still does enforce them to some extent (as, for instance, in the case of cheques); but that wise provision was largely supplanted by the rule that past consideration is no consideration. In order to neutralize some of the logical results of that rule, the courts set out to find a new consideration for a promise to pay an antecedent debt, and found it in forbearance (see the cases from *Alliance Bank* v. *Broom* (2) to *Glegg* v. *Bromley* (3) and *In re Wethered* (4)). This device has had an unforeseen effect on betting debts. Forbearance was introduced as a consideration in order to give effect to promises which ought to be enforced. It is now prayed in aid in betting cases so as to enforce promises which the legislature intended should not be enforced. This makes it necessary to recognize that, even in cases which are not betting cases, where a new promise is enforced because of forbearance, the forbearance (where there is no contractual promise to forbear) is not a real consideration, but only a conventional consideration which enables the new promise to be enforced. The new promise in such a case stands on the same footing as other promises which are enforced without the existence of any real consideration, such as promises of creditors under a composition arrangement to accept less than their due, and promises of a bank which, at the buyer's request and expense, notifies a seller that it has opened a credit in his favour. These promises are enforced when they are intended to be legally binding, intended to be acted upon, and are in fact acted on,

(1) [1909] 1 Ch. 291, 298.
(2) (1864) 2 Dr. & Sm. 289.
(3) [1912] 3 K. B. 474.
(4) [1926] Ch. 167.

even though it may be difficult in legal theory to find any real consideration for them. There is in truth no consideration unless the fact of acting on the promise is regarded as consideration. That is what Professor Ames desired (see Lectures on Legal History and Miscellaneous Legal Essays (Camb. U.S.A. 1913, at p. 323), but it now seems clear that these cases must be treated as exceptions to the doctrine of consideration. Ingenuity may suggest consideration, so as to make the law appear to be logically consistent, but, on some occasions (and this is one of them), it is necessary to shed fictions.

In this case, therefore, I hold there was no fresh real consideration. The new promise made by Mr. Salomonsen was nothing more or less than a promise to pay the betting debt, and the real consideration for it was the antecedent betting debt and nothing else. The action falls within the prohibition of the statute and must be dismissed with costs.

Judgment for defendant.

Solicitors for plaintiff company: *Sherrard & Sons.*
Solicitor for defendant: *Staddon, Pyke & Barnes.*

C. G. M.

C. A.

1948
Mar. 15.

Tucker and Somervell L.JJ. and Roxburgh J.

STANSBIE *v.* TROMAN.

Negligence—Decorator at work in house—House left unattended with door unlocked—Theft—Decorator's duty—Liability.

A contractor carrying out decorations in a house was to his knowledge left alone on the premises by the householder's wife. During her absence, he left the house to obtain wall-paper. He fastened back by its catch the latch of the yale lock on the front door and closed the door behind him. That door was accordingly then held shut only by its mortise lock, and could be opened by a mere turn of the handle. During the decorator's absence a thief entered the house and stole property, the value of which the householder claimed from the decorator.

Held (1.) that the contractual relationship between the decorator and the householder imposed a duty on the former to take reasonable care with regard to the state of the premises if he left them during the performance of his work; (2.) that it was a breach of that duty to leave the house with the front door in the condition in which he had left it; and (3.) that it was as a direct result of that

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

breach of duty that the thief had entered the house and stolen the property, because the breach of duty consisted in a failure to guard against the very loss which in fact occurred. The decorator was accordingly liable for the householder's loss.

Dictum of Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A. C. 956, 986, explained.

APPEAL from Birmingham county court.

On January 14, 1947, the plaintiff, Stansbie, a decorator, was at work in the house of the defendant, Troman. Between 1.30 and 2 p.m. Mrs. Troman, the householder's wife, left the house, having called up to the decorator that she was going out. The decorator was thus left alone in the house. At about half past three he went out to a neighbouring shop to buy a roll of wallpaper. On leaving the house he fastened back by its catch the latch of the yale lock on the front door, and pulled the door to. The door was then unlocked, but held to by its ordinary mortise lock with a handle, and it was only necessary to turn the handle to open the door. The decorator had some difficulty in obtaining the paper, and did not return until about 5.15 p.m. He then found the front door open. He waited until 8 p.m., and afterwards learnt from the householder that a quantity of articles, including a diamond bracelet and clothes, had been stolen. The value of those articles, 334*l*. 15*s*., was the subject of counterclaim by the householder in an action by the decorator for the price of work done.

The county court judge, in a reserved judgment, stated that the first question which he had to investigate was whether any duty was owed by the plaintiff decorator to the defendant householder; secondly, whether there had been any breach of that duty; and, thirdly, whether the damage had resulted from that breach. With regard to the first question, after referring to *Donoghue* v. *Stevenson* (1) he said: "But I think "that when the decorator was left alone in the house he was "in a position to exercise control over access into the house, "and this put him in such a relation to the householder that, "in exercising such control, he ought to have had in mind the "safety of the householder's goods which were in the house." He therefore gave judgment for the householder. The decorator now appealed.

R. K. Brown for the decorator. The first question is whether the decorator owed any duty to the householder in

---

(1) [1932] A. C. 562.

BIBL.
LONDIN.
UNIV.

this matter. That involves considering the relationship between the parties. It is submitted that, while there was a contractual relationship between them, there was no proximity of relationship such as that found in the line of cases to which *Donoghue* v. *Stevenson* (1) belongs. The relationship must be that of a tradesman to the person employing him. There was no relationship of a kind to create a duty in the decorator to keep the house secure against thieves. Certain duties rest on him because they are within the scope of his contractual obligations ; but it would be creating a totally different kind of duty, not within the scope of those obligations, if he were to be held responsible for the safety of the house in the absence of the householder. If he had been painting an empty house it would be his duty to lock it up if he left it. The painter at work in an empty house is its custodian. Here it is and remains the householder's business to look after his house. He cannot just shift on to the shoulders of a decorator his own normal responsibilities as a householder. Looking after the door is not part of the job of painting a house. The next question is whether, if there was a breach of duty, the damage here flowed from the breach. Lord Sumner in his opinion in *Weld-Blundell* v. *Stephens* (2) made an observation which exactly applies to this case. The theft which occurred here is the intervention of a third party which Lord Sumner supposed in his example. It breaks the chain of causation. Looking at all the facts of this case, surely it cannot be said that the act of this thief was the result of the decorator's leaving the door unlocked. The decorator was not the cause of the theft. The decorator was under no duty to leave the house secure ; if he was, he was not in breach of that duty ; and if he was in breach of duty the loss which occurred was not the result of it.

Verne for the householder was not called on to argue.

TUCKER L.J. It was argued for the decorator that no duty was owed, that the duty must arise from the relationship between the parties, and that it must be a duty within the scope of the contractual relationship existing between them. I agree that the duty must be within the scope of the contractual relationship between these two persons, but I think that that contractual relationship did impose a duty on the plaintiff decorator to take reasonable care with regard to the state of the premises if he left them during the performance of his work. That, I think, was the measure of the duty.

---

(1) [1932] A. C. 562.

(2) [1920] A. C. 956, 986.

The next question is whether there was a breach of that duty. If I am right as to the existence of the duty, I think that there can be no question but that there was a breach of it, for I do not think that it was acting reasonably, that it was taking reasonable care, to leave this empty house for a period of two hours with the front door in that condition. The county court judge, in considering that matter, applied the test of the ordinary reasonable man, quoting the words of Greer L.J. in *Hall* v. *Brooklands Auto Racing Club* (1): "the man "who takes the magazines at home, and in the evenings "pushes the lawn mower in his shirt sleeves," and said that he thought that the decorator, "having fastened back the latch "of the yale lock, ought not to have left the house more than "a few moments, if at all, and in staying away for as long as "two hours was guilty of negligence." I agree with that finding.

With regard to the third question, the judge said that he had found considerable difficulty and that his view had wavered, and continued: "It seems clear that the negligence of the "decorator was not the direct cause of the householder's loss. "The direct cause was the crime of the thief. The decorator "plaintiff was no party to the crime, which was a thing that "he never intended. On the other hand, the main purpose of "the latch is to keep out thieves, so far as the latch will serve. "If the latch be fastened back, the house needs watching; "and therefore the negligence of the decorator really consisted "in failure to take reasonable care to guard against the very "thing that happened. Forcing a door or breaking a window "takes time and may attract attention. The decorator's "negligence increased the problematic risk of the theft; "and the risk matured into a certainty."

Mr. Brown referred to *Weld-Blundell* v. *Stephens* (2) and, in particular, to the following passage in the speech of Lord Sumner (3): "In general (apart from special contracts and "relations and the maxim respondeat superior), even though "A. is in fault, he is not responsible for injury to C. which B., "a stranger to him, deliberately chooses to do. Though A. may "have given the occasion for B.'s mischievous activity, B. "then becomes a new and independent cause." I do not think

(1) [1933] 1 K. B. 205, 224.
(2) [1920] A. C. 956.
(3) Ibid. 986.

C. A.
1948
STANSBIE v. TROMAN.
Tucker L.J.

that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. The reason why the decorator owed a duty to the householder to leave the premises in a reasonably secure state was because otherwise thieves or dishonest persons might gain access to them; and it seems to me that if the decorator was, as I think he was, negligent in leaving the house in this condition, it was as a direct result of his negligence that the thief entered by the front door, which was left unlocked, and stole these valuable goods. Except that I would have phrased the nature of the duty somewhat differently from the way in which the county court judge put it, I am in entire agreement with his judgment, and in my view the appeal fails.

SOMERVELL L.J. This is not, I think, one of those cases that falls plainly on one side or other of some line which the law draws; it required careful consideration. In my opinion it received careful consideration from the county court judge, and I do not desire to add anything to what Tucker L.J. has said, with whose judgment I agree.

ROXBURGH J. I agree.

Appeal dismissed.

Solicitors for the plaintiff decorator: *Stafford Clark & Co., for Tanfield & Co., Birmingham.*

Solicitors for the defendant householder: *Swepstones, for Margetts & Ritchie, Birmingham.*

C. A.
1948
Apr. 8, 9, 22.
Lord Greene M.R., Somervell L.J. and Roxburgh J.

JUDSON *v.* ELLESMERE PORT EX-SERVICEMEN'S CLUB.

Industrial and provident societies—Club—Suspension or expulsion of member—Non-compliance with rules—Provision for arbitration—Applicability—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict., c.* 39), *s.* 49, *sub-s.* 1.

The Industrial and Provident Societies Acts, 1893 to 1928, contain no provision analogous to that of sub-s. 8 of s. 68 of the

Friendly Societies Act, 1896, as amended by the Friendly Societies Act, 1908, and therefore it is still good law that a dispute between a member of a society registered under the Industrial and Provident Societies Acts and the society on the question whether his membership has been duly terminated is not a dispute between the society and him as a member, which must be determined by arbitration in accordance with the rules, under s. 49, sub-s. 1 of the Industrial and Provident Societies Act, 1893. Therefore, where a member of a registered society brought an action in the county court alleging that the committee had wrongfully terminated his membership in breach of the rules :—

Held, that the action could not be stayed.

Willis v. *Wells* [1892] 2 Q. B. 225 and *Palliser* v. *Dale* [1897] 1 Q. B. 257, followed, and held not to be inconsistent with *Heyman* v. *Darwins, Ld.* [1942] A. C. 356.

APPEAL from Birkenhead county court.

The plaintiff, Frederick Esmond Judson was in 1934 elected a member of the Ellesmere Port Ex-Servicemen's Club, Ld., which was a club registered under the Industrial and Provident Societies Acts, 1893 to 1928, and he had duly paid all subscriptions due from him. The rules of the defendant club contained the following provisions :

" 14. The committee shall have power to reprimand, suspend, " or expel any member who shall infringe any rule, or whose " conduct, whether within or without the club-house, shall, " in their opinion, render him unfit for membership : but no " member, unless convicted of an offence by a court of summary " jurisdiction or other court, shall be suspended or expelled " without being first summoned before the committee to explain " his conduct, and opportunity given to advance a defence, " . . . . Every member so summoned shall . . . . receive " at least three clear days' notice in writing from the secretary. " Such notice shall contain a statement of the charge brought " against him."

" 15. A member suspended or expelled shall have the right " to appeal only to the arbitrators appointed, and under the " conditions laid down in Rule 28 section (2.). The arbitrators " shall have full power to alter or rescind such suspension or " expulsion as they may think fit . . . . and there shall be no " appeal from their decision."

" 28. (2.) All disputes between a member or person aggrieved " who has for not more than six months ceased to be a member " . . . . and the club or the committee shall be referred to the " Executive of the Working Men's Club and Institute Union, "or such person or persons as it may appoint, who shall be the "arbitrator or arbitrators of the club, whose decision shall be "final."

"29. No gambling, drunkenness, bad language or other "misconduct shall be permitted on the club premises. Any "member offending under this rule shall be dealt with by the "committee under rule 14."

The plaintiff alleged in his particulars of claim that on March 22, 1947, he was informed by the chairman of the club that he had been suspended, and that he had since that date been excluded from the club; that he had not been summoned before the committee nor given any opportunity to advance a defence. The plaintiff wrote to the secretary, inquiring the reason for his suspension, and received a reply from the club's solicitors, as follows: "We are instructed to inform you that "your membership terminated in accordance with the "agreement which you signed on your application for membership of the club, by reason of your failure to observe the rules "of the club, namely by your persistent gambling on the club "premises, and this after repeated warnings. We are asked to "point out that as the termination of your membership did "not arise by express expulsion, it is open to you if you so desire "to make application again for membership, in which event, "on the completion of the usual forms and a personal "attendance before the committee, your application will be "considered on its merits."

The plaintiff brought an action in the Birkenhead county court claiming (1.) an injunction to restrain the committee from enforcing the suspension of the plaintiff; (2.) a declaration that the plaintiff was still a member of the club and entitled to all rights and privileges as a member; (3.) damages not exceeding 50*l*. The defendants moved to stay the action on the ground that the plaintiff should have proceeded to arbitration under r. 15. The county court judge refused to stay the action, and the defendants appealed.

F. Elwyn Jones and *Edward Steel* for the defendants.
J. H. Barrington and *J. M. Kennan* for the plaintiff.

Cur. adv. vult.

April 22. LORD GREENE M.R. I have read the judgment which is about to be delivered by SOMERVELL L.J. and I agree with it.

C. A.

1948

JUDSON
v.
ELLESMERE
PORT
EX-SERVICE-
MEN'S
CLUB.

SOMERVELL L.J. I am authorized to say on behalf of ROXBURGH J., who has also read this judgment, that he agrees with it.

This is an appeal from a decision of His Honour Deputy Judge Smylie sitting at Birkenhead county court, refusing an application by the defendants to stay proceedings.

[His Lordship stated the pleadings and continued :]

When the matter came on before the learned judge, it is clear from his note that the defendants based their submission at any rate in the first instance, not under s. 4 of the Arbitration Act, but under s. 49, sub-s. 1, of the Industrial and Provident Societies Act, 1893 (1). No objection appears to have been taken nor was any objection taken before us that this section was not expressly referred to in the defendants' original application.

[His Lordship read s. 49, sub-s. 1, of the Industrial and Provident Societies Act, 1893, the rules of the club and the letter of April 23 set out above, and continued :]

The question is whether the dispute as it appears in the particulars of claim is within the words of s. 49, sub-s. 1 so that it must be determined by arbitration in accordance with the rules quoted.

Similar provisions to those contained in s. 49, sub-s. 1, of the Act referred to are to be found in the Friendly Societies Acts, and it is on the cases decided under those provisions that the defendants relied.

If these cases are still good law, the county court judge's decision must, I think, stand. Counsel for the defendants submitted, however, that although not expressly overruled they were inconsistent with the decision of the House of Lords in *Heyman* v. *Darwins, Ld.* (1). One of the cases in question was a decision of this court, and it is laid down in *Young* v. *Bristol Aeroplane Co., Ld.* (2), that this court "is bound to "refuse to follow a decision of its own which, though not "expressly overruled, cannot in its opinion, stand with a "decision of the House of Lords."

---

(1) The Industrial and Provident Societies Act, 1893, s. 49, sub-s. 1 : "Every dispute between a member of a registered society, or any "person aggrieved who has for "not more than six months "ceased to be a member of a "registered society, or any person "claiming through such member "or person aggrieved, or claiming "under the rules of a registered "society, and the society or an "officer thereof, shall be decided "in manner directed by the rules "of the society, if they contain "any such direction, and the "decision so made shall be binding "and conclusive on all parties "without appeal, and shall not "be removable into any court of "law or restrainable by in-"junction; and application for the "enforcement thereof may be "made to the county court."

I will now consider the three decisions under the Friendly Societies Acts. The first is *Prentice* v. *London* (3). In that case the society was maintaining that the plaintiff had never become a member. In the later cases, as in the present case, the plaintiff was admitted to have been a member and the dispute arose as to whether he had been properly deprived of his membership. In considering whether an arbitration clause applies, there is obviously a difference in principle between these two different circumstances. The court, however, did not rely on this. Brett J. referred to an earlier case of *Morrison* v. *Glover* (4), the facts of which were different but in which the Court of Exchequer had decided in construing similar words that for the arbitration clause to apply it must be shown that the subject matter in dispute is one arising between, in that case, the trustees and a member of the society *as a member.* Brett J. in *Prentice* v. *London* (5) said: "A dispute as to "whether a party is a member or not clearly is not a dispute "between the society and the plaintiff as a member. That "being so, r. 30 does not oust the jurisdiction." Some of the other judges did not put it quite so widely, but in *Willis* v. *Wells* (6), the principle as enunciated by Brett J. was applied to exclude from s. 22 of the Friendly Societies Act, 1875, a dispute as to whether the plaintiff had been properly expelled. Section 22 reads as follows: "Every dispute between a member "or person claiming through a member or under the rules of a "registered society, and the society or an officer thereof, shall "be decided in manner directed by the rules of the society." Grantham J. said this: "the affidavit of the defendant York "distinctly states that the defendants refused to consider the "plaintiff any longer a member of the society: that being so "the present case cannot be treated as a dispute between the "plaintiff as a member of the society and the society." He then quoted the sentence I have quoted from the judgment of

(1) [1942] A. C. 356.
(2) [1944] K. B. 718, 729.
(3) (1875) L. R. 10 C. P. 679.
(4) (1849) 4 Ex. 430.
(5) L. R. 10 C. P. 679, 687.
(6) [1892] 2 Q. B. 225.

Brett J. in the earlier case and also a sentence from a judgment of Lindley J.

The issue came before this court in *Palliser* v. *Dale* (1). By that time s. 22 of the Friendly Societies Act, 1875, had been amended by an Act of 1895 which extended s. 22 to apply to every dispute between the society and any person aggrieved who had for not more than six months ceased to be a member of the society. The first argument, which was rejected, was that this provision overruled the principles as laid down in *Willis* v. *Wells* (2). The court then went on to consider the construction of the words of s. 22. The earlier cases to which I have referred were expressly approved. Lord Esher M.R. said (3): "It was "correct to say that a dispute as to whether a person is a "member of a society or not is not a dispute between the society "and the member of it as such." He also put it in this way: "If the society choose to expel a member, they are estopped "from afterwards saying that he is a member, and therefore "bound by the provision of the rules with regard to disputes "between the society and a member of it." Lopes L.J. delivered judgment on the same lines. The words of s. 22 having been judicially construed in this sense, in 1908 by the Friendly Societies Act of that year, the Friendly Societies' code was amended by adding a sub-section (8.) to the section containing the provisions considered in these cases, which by that time was s. 68 of the consolidation Friendly Societies Act of 1896. That sub-section provided that "the expression "'dispute' includes any dispute arising on the question "whether a member or person aggrieved is entitled to be or "to continue to be a member or to be reinstated as a member." Although there have been a number of Acts amending and adding to the statutory provisions relating to Industrial and Provident Societies, no such amendment has been made to that code. It may be that the question had not arisen with regard to such societies, but it seems to me impossible to proceed on the assumption that the absence of any amendment to the similar provisions in that code was due to inadvertence. I have referred to this matter because it seems to me that it should make this court reluctant to regard these cases as overruled unless it is plain that they cannot stand in the light of the decision in *Heyman* v. *Darwins, Ld.* (4), to which I will now

(1) [1897] 1 Q. B. 257.
(2) [1892] 2 Q. B. 225.
(3) [1897] 1 Q. B. 257, 261.
(4) [1942] A. C. 356.

C. A.

1948

JUDSON v. ELLESMERE PORT EX-SERVICEMEN'S CLUB.

Somervell L.J.

refer. The issue there arose under an arbitration clause in a contract which was as follows: "If any dispute shall arise "between the parties hereto in respect of this agreement or any "of the provisions herein contained or anything arising hereout, "the same shall be referred for arbitration in accordance with "the provisions of the Arbitration Act, 1889, or any then "subsisting statutory modification thereof." The facts are somewhat complicated, but the issue was whether an arbitration clause applied when one party to the contract was refusing to carry it out and the other party accepted this as a repudiation claiming damages on the ground that the refusal to carry out the contract was wrongful.

There were certain dicta in earlier cases, which were carefully considered in the various speeches, that in these circumstances an arbitration clause was inapplicable. The effect of the decision is, I think, sufficiently summarized for present purposes in the following paragraph from the speech of Viscount Simon L.C. (1): "If the dispute is whether the contract which "contains the clause has ever been entered into at all, that "issue cannot go to arbitration under the clause, for the party "who denies that he has ever entered into the contract is "thereby denying that he has ever joined in the submission. "Similarly, if one party to the alleged contract is contending "that it is void ab initio (because, for example, the making of "such a contract is illegal), the arbitration clause cannot "operate, for on this view the clause itself also is void. But, "in a situation where the parties are at one in asserting that "they entered into a binding contract, but a difference has "arisen between them whether there has been a breach by one "side or the other, or whether circumstances have arisen "which have discharged one or both parties from further "performance, such differences should be regarded as "differences which have arisen 'in respect of,' or 'with regard "'to,' or 'under' the contract, and an arbitration clause which "uses these, or similar expressions should be construed "accordingly."

In any event, this decision will, I think, leave unaffected the actual decision in *Prentice* v. *London* (2), because in that case the society was maintaining that the plaintiff had never become a member. It is submitted by the defendant, however, that *Willis* v. *Wells* (3) and *Palliser* v. *Dale* (4) can no longer

(1) [1942] A. C. 356, 366.

(2) L. R. 10 C. P. 679.

(3) [1892] 2 Q. B. 225.

(4) [1897] 1 Q. B. 257.

be regarded as good law. Speaking for myself and with great diffidence, if we were free to re-consider those decisions, I am doubtful whether I should come to the same conclusion. That, however, is not the question before us. The question is whether they can stand in the light of the House of Lords' decision. If they can, *Palliser* v. *Dale* (1) is binding upon us. I think they are consistent with it. All their Lordships stressed the importance of the precise words of the arbitration clause which might be in question. The words in the statute are not "any dispute arising in respect of membership," or "with regard to the relations between a member and the "society." One might imagine a parallel in an ordinary contractual case if, for example, X employed a number of agents and had a form of contract which contained a clause "any dispute between an agent and X shall be referred to "arbitration." This might well be construed more narrowly than a clause which said "any dispute in respect of or with "regard to the contract of agency." It would, I think, be possible that the principle expressly laid down in *Palliser* v. *Dale* (1) might be applied to such a clause consistently with the House of Lords' decision. I must not be taken as expressing any opinion on the question whether it ought or ought not to be so applied. That it might be is sufficient to prevent me from saying that *Palliser* v. *Dale* (1) cannot stand with *Heyman* v. *Darwins, Ld.* (2). For these reasons I think the defendants' argument on this point fails.

The plaintiff sought to rely on the decision of the House of Lords in *Andrews* v. *Mitchell* (3), but, in my view, that decision does not assist in the present argument. It was a case in which a member of a Friendly Society was summoned before an arbitration committee. That committee purported to expel him, not for the offence for which he had been brought before them but for another offence which the arbitration committee held he had committed. In respect of that offence he had not had the proper notice in accordance with the rules and had not been properly heard. In the lower courts the summons for a writ of prohibition which had been made on behalf of the Friendly Society to stay the proceedings had been dismissed upon the authority of *Palliser* v. *Dale* (1) which the House of Lords were invited to overrule: they refrained from overruling or dealing with it, holding that the arbitration committee

(1) [1897] 1 Q. B. 257.
(2) [1942] A. C. 356.
(3) [1905] A. C. 78.

had proceeded without jurisdiction and its decision was, therefore null and void ab initio. A study of the printed case and record makes it clear that the defendant was maintaining that the decision of the arbitration committee was an effective decision and the only right of the plaintiff was to appeal against it in accordance with the rules. The issue, therefore, was, as it seems to me, a different one.

In the present case there has been no decision by an arbitrator or arbitration committee. In *Andrews* v. *Mitchell* (1), if, as the House of Lords held, the original decision was null and void clearly the plaintiff could not be restricted to a right of appeal against it.

Counsel for the defendant at one time suggested that he could rely on the words: " any person. . . . . claiming under the " rules," in r. 29 (1.). The difficulty about this suggestion is that identical words occur in s. 22 of the Act of 1875 as construed in the cases to which I have referred. These words must have been construed as not covering a dispute as to whether a person who had been a member had been properly expelled. They were no doubt put in to cover persons who though not members would or might have rights or obligations vis-a-vis the society which were dealt with by the rules. The provisions of the present rules as to loans might I think give rise to disputes covered by these words.

Counsel for the defendant also submitted that the arbitration clause in the rules was wider than the provisions of the Act and if he failed under the Act he could apply for the discretionary stay under s. 4 of the Arbitration Act, 1889. I cannot see that the clause is wider than the Act. It follows its wording very closely and does not in my opinion cover any dispute which is not within s. 49, sub-s. 1.

I therefore think that the appeal must be dismissed.

Appeal dismissed.
Leave on terms to appeal.

Solicitors for defendants: *Lovell, Son & Pitfield, for Walker, Smith & Way, Chester.*

Solicitors for plaintiff: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

(1) [1905] A. C. 78.

J. W. H.

Applied. LANGFORD PROPERTY CO., LTD. *v.* BATTEN. [1949] 2 All E.R. 422.

Explained. LANGFORD PROPERTY CO. LD. *v.* BATTEN [1951] A. C. 223

HEMNS *v.* WHEELER

C. A.

1948

Mar. 12, 23.

Tucker, Somervell and Cohen L.JJ.

Landlord and tenant—Rent restriction—Standard rent—House damaged by enemy action—Reconstruction and addition of land—Effect on identity—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 2 (iii.).

The mere addition to the site of a dwelling-house within the Rent Restriction Acts of land, the rateable value of which let separately would be less than one quarter of the rateable value of the house, does not render the house a different one from that which existed before.

A house within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which was in August, 1914, let at 4*s.* 6*d.* a week, so that that became its standard rent under s. 12, sub-s. 1, of the Act, was damaged by an enemy bomb during the war of 1939. It was repaired and improved, and land 364 square feet in area was added to the site by the landlord in compliance with a by-law. The area of the site was thus increased by 75 per cent. On the added land, the rateable value of which, if let separately, would not have exceeded one quarter of the rateable value of the house, a yard was laid and an outside w.c. built. In August, 1942, the house, as thus improved, was let at 15*s.* a week. The county court judge held, in proceedings for determination of the standard rent, that the house was still the same house which was let in August, 1914, and that 4*s.* 6*d.* was still the standard rent. On appeal by the landlord,

Held (1.) that it was for the county court judge to find the facts and draw inferences from them, although whether there was evidence to support his findings of fact and whether the inferences which he had drawn were possible inferences from the facts as found were questions of law for the Court of Appeal; and (2.) that the county court judge's finding that no sufficient change had occurred to make the house a different one from that let in 1914, so that the standard rent was still 4*s.* 6*d.* a week, was in law a possible inference from the facts notwithstanding, in particular, the addition of land to the site, and was accordingly a finding with which the Court of Appeal could not interfere; although it did not follow that the addition of the land in connexion with structural improvements was not a relevant matter for consideration on the issue of fact as to the identity of the dwelling-house.

Ellis & Sons Amalgamated Properties Ld. v. *Sisman* [1948] 1 K. B. 653 explained.

APPEAL from Swansea county court.

The following statement of the facts is taken from the judgment of Tucker L.J. In August, a house, No. 25,

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Plymouth Street, Swansea, was let as a separate dwelling-house at 4*s*. 6*d*. per week. The rateable value was 8*l*. per annum. Accordingly, it was a house which, so long as it continued to be so let, came within the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. During the war it suffered bomb damage. This was repaired at a cost of some 97*l*., and at the same time certain structural alterations and improvements were carried out at an approximate cost of 100*l*. These included new drains and the addition of a kitchen-living-room on the ground floor measuring eleven feet by eight feet. In order to comply with the by-laws of the local authority, the landlord, the present appellant, had to acquire a piece of land at the rear of the premises. It was agreed that the added land was not sufficient in rateable value if let separately to take the dwelling-house out of the Act. On the land so acquired some paving was put down to make a yard, and an outside w.c. was erected, but the whole of the new room was built on the old site. The area of land added to the original site was three hundred and sixty-four square feet, making an increase of approximately seventy-five per cent. The superficial dwelling-house area of the cottage was increased by one hundred and three square feet. These premises were let to the respondent tenant in October, 1942, at 15*s*. a week. The rateable value remained unchanged at 8*l*.

Under s. 12, sub-s. 1, of the Act of 1920, the standard rent is the rent at which the dwelling-house was let on August 3, 1914, or, in the case of a dwelling-house which was first let after that date, the rent at which it was first let. The question having arisen whether the standard rent was 4*s*. 6*d*. a week under the Act of 1920, or 15*s*. a week under the Rent and Mortgage Interest Restrictions Act, 1939, as being the rent at which it was first let after September 1, 1939, the matter came before the county court under s. 11, sub-s. 1, of the Act of 1933, and was referred to the deputy registrar under r. 4 of the Rent (Restrictions) Rules, 1923. The deputy registrar fixed the standard rent at 4*s*. 6*d*. a week. The county court judge affirmed that decision, and the landlord now appealed.

L. A. Blundell for the landlord. What has happened to this house since 1914, it is submitted, makes it a new house let for the first time in 1942, so that 15*s*. a week should be taken as the standard rent. The correct inference to be drawn from the established facts is a question of law for this court: *Eyre* v.

Haynes (1), *Sinclair* v. *Powell* (2) and *Ellis & Sons Amalgamated Properties, Ld.* v. *Sisman* (3). This court is entitled to look at the evidence and consider whether the county court judge has drawn the right inference.

There was no evidence on which the judge could find that the house let in 1942 was that let in 1914. The effect of what was done was to change it from a tiny three-roomed cottage into a small three-roomed house. A substantial addition was made which altered the functions of the rooms in the original house, redistributing them so as to provide a substantial kitchen and scullery. The living accommodation is now spread over a larger set of rooms than before. The only possible inference from that is that what exists now is not the house which existed before. The accommodation has been substantially increased by the addition of a new room which will be one of the most important parts of the house, namely, the kitchen and scullery. Surely the only possible inference is that a house now exists which did not exist before.

There remains the fact that land has been added to the site. These premises are now a house with an added paved yard, garden and outside lavatory. That is the " dwelling-house " now let. The house let in 1914 was a different house from that, and it was different if only because what is now the site of the house was then in two different ownerships.

[SOMERVELL L.J. The argument must be that the addition of any land to the site changes the dwelling-house ?]

Yes. What is now this dwelling-house was in 1914 let in two parts. The change effected does not affect the continued protection under the Rent Restriction Acts. It is a matter affecting only the standard rent, which, by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, will be 15*s*. if the house was first let in 1942. [*Vaughan* v. *Shaw* (4) and *R. & P. Properties, Ld.* v. *Baldwin* (5) referred to.]

Rowe Harding for the tenant. Admittedly, once the land let with a dwelling-house is such that its value, if it were let separately, would exceed one-quarter of the rateable value of the house itself, the whole property goes outside the scope of the Rent Restriction Acts ; but a house remains within the scope of the Acts unless and until such an addition is made,

(1) (1945) 62 T. L. R. 63.
(2) [1922] 1 K. B. 393.
(3) [1948] 1 K. B. 653.
(4) [1945] K. B. 400.
(5) [1939] 1 K. B. 461.

and land which is not of the rateable value referred to is part of the house: see proviso (iii) to s. 12, sub-s. 2, of the Act of 1920. Its addition, therefore, cannot by itself change the identity of the dwelling-house. The interpretation of the Acts advanced for the landlord opens up an avenue leading to extraordinary results. It would nullify the protection given by the Acts to in-coming tenants (though not, it is true, in respect of security of tenure) and would place such tenants at the mercy of a landlord in the matter of the rent chargeable. The garden or added land of a site is to be disregarded unless its rateable value, if it is let separately, exceeds one-quarter of that of the house. The tenant is entitled to enjoy not only the house but also the land which goes with it until and unless its rateable value is thus excessive. The whole purpose of the Acts is to protect tenants. Under those Acts premises are not considered as strictly from the point of view of the law of landlord and tenant as are premises outside the Acts held on a contractual tenancy. The whole policy of the Acts is directed to bricks and mortar. The position is simply that this house was let in 1914, and that it is now let, since 1942, with a small garden which, by virtue of s. 12, sub-s. 2 (iii), of the Act of 1920, is to be disregarded.

Blundell in reply. If the addition of land, the rateable value of which, let separately, exceeds the rateable value of the house, has been held to take the house out of the Act, that surely shows that the fact that there were the same bricks and mortar throughout does not matter, and that it is the addition of land which counts. The effect of s. 12, sub-s. 2 (iii) of the Act of 1920 is that the bricks and mortar and garden are all called a house. It follows, surely, that the present house, with its added, or different land, is a different house from that let in 1914. The sub-section contemplates a house in the extended sense as including certain land. That being so the house, in the extended sense, now let cannot be the same house in that sense which was let in 1914, for it includes different land.

Cur. adv. vult.

March 23. Tucker L.J., read the following judgment. The question for determination in the present proceedings is whether the dwelling-house which was let to the tenant in October, 1942, was let for the first time, or whether it was let on August 3, 1914. In other words, had No. 25, Plymouth Street, which was let as a dwelling-house in 1914, been so altered or added to by October, 1942, that it had lost its identity and become a different dwelling-house? This is a question of fact.

It was contended by Mr. Blundell for the landlord that the proper inference to be drawn from the admitted facts was a question of law for this court, and in support of this argument he referred to a passage from a judgment of mine in *Ellis & Sons Amalgamated Properties, Ld.* v. *Sisman* (1) where, in dealing with a somewhat similar point involving the question of the identity of a dwelling-house in the course of erection with that which had originally been let, I said: " It is contended that that is a finding of fact which concludes the " matter. I do not agree: it must be a question of law " whether on the facts, which were undisputed, this house " could be said to have ceased to exist or not, and, in my view, " on the undisputed facts it is impossible to say that the house " in course of erection was the same house as that which had " been damaged by enemy action." It is to be observed that I said " whether . . . . this house *could be said* to have " ceased to exist," and " in my view . . . . *it is impossible* " *to say*." The decision as a whole, as is made clear from the judgment of Cohen L.J., is merely an instance of the rule that whether there is any evidence to support the county court judge's findings of fact is always a question of law. In that case the view of this court was that there was no evidence to support the judge's finding, and that in arriving at his finding he had misdirected himself in applying the test of the landlord's or tenant's liability under a covenant to repair. The headnote (2) which states: " *Held*, (1.) that the question whether the " house in course of erection was a different house from the " old one, or merely the old one in the course of repair, was " one of law and not of fact " is inclined to be misleading. Reference to *Phillips* v. *Barnett* (3), *Sinclair* v. *Powell* (4) and *Eyre* v. *Haynes* (5) shows that, in cases where this issue arises, it is for the county court judge to find the facts and to draw the inferences from those facts, but that it is always a question of law, which will warrant the interference of this court, whether there was any evidence to support his findings of fact

(1) [1948] 1 K. B. 653, 665.
(2) 64 T. L. R. 11.
(3) [1922] 1 K. B. 222.
(4) [1922] 1 K. B. 393.
(5) 62 T. L. R. 63.

and whether the inferences he has drawn are possible inferences from the facts as found. I did not intend in *Ellis & Sons Amalgamated Properties, Ld.* v. *Sisman* (1) to be understood as throwing any doubt on the propositions stated above.

In the present case the facts found are not in dispute, and in my view the inference drawn from those facts by the judge, namely, that there has been no substantial change sufficient to make the house a new dwelling-house, is a possible inference resulting in a finding with which this court cannot interfere. It is to be noted that it was not disputed that the alterations and additions to the building were such as would justify the landlord in increasing the rent above the amount of the standard rent to the extent permitted by s. 2, sub-s. 1 (*a*) of the Act of 1920.

This disposes of the main argument addressed to the county court judge, but on this appeal Mr. Blundell has advanced a further contention, which, I think, was sufficiently covered by the points taken in the court below to entitle him to rely on it in this court, but which was not expressly dealt with in the judgment of the county court judge, and which clearly raises a question of law. It may be stated as follows: The letting in October, 1942, was a complex letting of house plus added piece of land with yard and w.c. upon it. Can the standard rent of this complex unit be the same as that of the house by itself before the addition of this piece of land? This argument has certain attractions, but in my view it cannot prevail. There is no doubt that the premises let in 1942 differed from those let in 1914 by reason of this added area of land, and, if we were concerned merely with the identity of the premises, it would, I think, be difficult to hold that the premises were the same; but the Rent Restriction Acts deal with dwelling-houses as distinct from premises. Paragraph (iii) of the proviso to s. 12, sub-s. 2, of the Act of 1920 is as follows: "For the purposes of this Act, any land or premises let together "with a house shall, if the rateable value of the land or premises "let separately would be less than one-quarter of the rateable "value of the house, be treated as part of the house, but, subject "to this provision, this Act shall not apply to a house let "together with land other than the site of the house." Note the words "treated as part of the house." This results in a notional dwelling-house consisting of bricks and mortar plus land. I think that the policy of the Acts is, in effect, to ignore

(1) [1948] 1 K. B. 653.

the existence of these small plots of land and added premises in ascertaining what is the dwelling-house. No doubt, where the rateable value of the added area exceeds one quarter of the rateable value of the house, the resulting premises will be excluded from the Acts, but any addition of less rateable value not only keeps the house within the Acts but is "treated as "part of the house." In the present case we have a dwelling-house, No. 25, Plymouth Street, let as a separate dwelling in August, 1914. In 1942 a piece of land, which has to be "treated "as part of the house", is added. The dwelling-house remains the same, and it is, in my view, erroneous to say that this dwelling-house was not let in August, 1914, merely because a piece of land has been added. Looked at in this way, *Vaughan* v. *Shaw* (1) and *R. & P. Properties, Ld.* v. *Baldwin* (2) cited by Mr. Blundell do not, I think, really afford us any assistance.

For these reasons I think that this appeal fails; but, in so deciding, I desire to make it plain that I am not saying that the addition of a piece of land in connexion with structural alterations and improvements is not a relevant matter to be taken into consideration, as I think it was by the county court judge in the present case, on the issue of fact as to the identity of the dwelling-house.

SOMERVELL L.J. I have had the advantage of reading the judgment that has just been delivered. I agree with it, and I do not desire to add anything.

COHEN L.J. I too, have read the judgment just delivered, and I do not desire to add any reasons of my own. I agree with it, and I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the landlord: *Hirst, Miles Griffiths & Co., for D. R. James & Meredith, Pontardawe.*

Solicitors for the tenant: *Vizard, Oldham, Crowder & Cash, for Clifford J. White, Swansea.*

(1) [1945] K. B. 400.

(2) [1939] 1 K. B. 461.

1948
Mar. 4, 12.

Atkinson J.

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* TATUM.

Police—Metropolitan police officer injured through negligence of defendant—Hospital charges and officer's wages and allowances during illness paid by Receiver for Metropolitan Police District—Custodian of fund for purposes of police—Power of Receiver to sue for, and right to recover, expenses from defendant—Metropolitan Police Act, 1829 (10 *Geo.* 4, *c.* 44), *s.* 12*—Metropolitan Police* (*Receiver*) *Act,* 1861 (24 *&* 25 *Vict.*, *c.* 124), *s.* 1.

The Receiver for the Metropolitan Police District, who under ss. 10 and 12 of the Metropolitan Police Act, 1829, is appointed by the Crown as custodian of a fund for the purposes of the police, is charged with the duty of paying the wages and allowances of members of the force and " all other charges and expenses " which the Home Secretary shall direct to be paid for carrying the Act into execution. Under s. 1 of the Metropolitan Police (Receiver) Act, 1861, the Receiver is a corporation sole, with capacity to sue and be sued and to " do all other acts necessary or expedient to be done " in the execution of the duties of his office."

The Receiver, having paid the hospital charges and pay and allowances during disablement of a police officer injured through the negligence of the defendant, brought the present action to recover from the defendant the sums so paid. The defendant contested the Receiver's right to sue, on the ground that the claim for hospital charges should have been brought by the Attorney-General on behalf of the Crown, and that as a claim for pay and allowances must be based on loss of services and police officers are servants of the Crown and not of the Receiver, the Crown alone could bring such a claim.

Held, that the hospital charges being an expense which the Receiver, as a result of the defendant's negligence, was legally bound to incur, he was entitled to recover them from the defendant; that as those charges had been paid out of a public fund of which he was the custodian on behalf of the Crown, the Receiver alone could bring the action; and that as the claim for pay and allowances was not based on loss of service but on the fact that the Receiver, acting under statutory regulations, had been compelled by the defendant's negligence to pay the sums in question and thus deplete the public fund of which he was custodian, he was entitled to be indemnified by the defendant.

Principle enunciated by Lord Wright in *Brook's Wharf & Bull Wharf, Ld.* v. *Goodman Bros.* [1937] 1 K. B. 534 applied.

ACTION tried by ATKINSON J.

Wood, a police officer in the metropolitan police force, while on duty, sustained through the negligence of the defendant serious injuries which ultimately led to the termination of his employment in the force. For some months, during disablement, he received his wages and allowances amounting to 336*l.* 17*s.* 6*d.* from the Receiver for the Metropolitan Police District, who also paid the hospital charges amounting to 27*l.* 10*s.* 6*d.* By the present action the Receiver, as custodian of the police fund, out of which the above payments were made, claimed to recover the expenditure from the defendant. The defendant denied the right of the Receiver to sue.

Flowers K.C. and *P. O'Connor* for the plaintiff. By ss. 10 and 12 of the Metropolitan Police Act, 1829 (1) it is provided that His Majesty may appoint a proper person to receive all sums of money applicable to police purposes, who shall be called the Receiver for the Metropolitan Police District. The Receiver is required to pay all moneys received into an account at the Bank of England and to draw upon the fund for the payment of wages and allowances and also for the payment of "all other charges and expenses" which the Home Secretary shall direct to be paid for carrying the Act into execution. The Receiver being appointed by the Crown is an agent and servant of the Crown and is bound to deal with the moneys entrusted to him in accordance with regulations made by the Home Secretary. By s. 1 of the Metropolitan Police (Receiver) Act, 1861 (2), the Receiver is given power to sue by his official title and to do all other acts necessary or expedient to be done in the execution of his office. He is compelled by law to make

(1) Metropolitan Police Act, 1829, s. 10: "it shall be lawful "for His Majesty to appoint a "proper person to receive all sums "of money applicable to the pur-"poses of this Act, who shall be "called 'The Receiver for the "'Metropolitan Police District "'. . . .'."
Section 12: "the Receiver, "out of the moneys so received by "him . . . . shall from time to "time pay to the persons belong-"ing to the police force appointed "under this Act, such salaries, "wages and allowances, and at "such periods, as one of His "Majesty's Principal Secretaries "of State shall direct . . . . and "he shall also pay all other charges "and expences which such Princi-"pal Secretary of State shall "direct to be paid for carrying this "Act into execution."

(2) Metropolitan Police (Re-"ceiver) Act, 1861, s. 1: "The person "for the time being holding the "office of Receiver for the Metro-"politan Police District shall be a "corporation sole . . . . shall "have perpetual succession, with "a capacity by his official name "to . . . . sue and be sued . . . . "and to do all other acts neces-"sary or expedient to be done in "the execution of the duties of his "office."

these payments, for which he now sues, while a man is on the strength of the force. The Crown, having in effect expended these sums, is entitled to be reimbursed by the defendant, whose negligence has caused the necessity. The claim to recover the wages and allowances is maintainable quite apart from loss of services.

[*Attorney-General* v. *Valle-Jones* (1); *Brook's Wharf & Bull Wharf, Ld.* v. *Goodman Bros.* (2); and *Hall* v. *Hollander* (3) referred to.]

Caulfield for the defendant. Even if the Receiver is compelled by law to pay these sums it does not follow that he is entitled to sue. There is a wide difference between his doing acts which are "necessary or expedient to be done in the execution "of the duties of his office," and suing for wages which he thinks it is expedient to pay. The claim for hospital expenses should have been brought by the Attorney-General on behalf of the Crown, as was done in *Attorney-General* v. *Valle-Jones* (1). The basis of a claim for wages is loss of service. A police constable is a servant of the Crown (per McCardie J. in *Fisher* v. *Oldham Corporation* (4)) and therefore the Crown alone can claim in this case. There is nothing in the statute which empowers the Receiver to step into the shoes of the Crown for the purpose of this action. There is no contractual relationship between a police officer and the Receiver.

ATKINSON J. A police officer in the metropolitan police force, who was the plaintiff in another action, suffered, through the negligence of the defendant, an injury which led to the termination of his employment in the police. For some months Wood, the officer in question, received his wages from the present plaintiff, the Receiver for the Metropolitan Police District, who also paid his expenses while in hospital. The motor cycle which Wood was riding at the time of the accident and which was damaged was the property of the Receiver, who, in the present action, seeks to recover the expenses to which he has been put. The point has been taken by counsel for the defendant that the Receiver is not the proper person to sue for the sums claimed by him and is not entitled to recover them. By s. 10 of the Metropolitan Police Act, 1829, "It shall be lawful for "His Majesty to appoint a proper person to receive all sums "of money applicable to the purposes of this Act, who shall

(1) [1935] 2 K. B. 209.

(2) [1937] 1 K. B. 534.

(3) (1825) 4 B. & C. 660.

(4) [1930] 2 K. B. 364.

"' be called 'The Receiver for the Metropolitan Police District'." The section goes on to provide that the Receiver must keep accounts and pay all moneys received under the Act into the Bank of England, and such moneys shall be placed in an account entitled : " The account of the public moneys of the Receiver " for the Metropolitan Police District," and the Receiver "shall " draw out of the bank from time to time such sums of money " as may be necessary for the payment of the salaries, wages, " and allowances . . . . to the persons belonging to the police " force appointed under this Act, and also for the payment of all " other charges and expenses in carrying this Act into " execution . . . ." Section 12 provides that the Receiver, out of the moneys so received by him, shall from time to time pay to persons belonging to the police force such salaries, wages and allowances, and any extraordinary expenses which are necessarily incurred in certain matters, and on receipt of the necessary order shall pay such sums as the Secretary of State directs to any police officer as a reward for extraordinary diligence or exertion, or as compensation for wounds, and so on. The last sentence of s. 12 provides : " and he shall also pay all " other charges and expenses which such principal Secretary " of State shall direct to be paid for carrying this Act into " execution ". It is plain, therefore, that the Receiver is appointed by the Crown and is an agent and servant of the Crown.

The Metropolitan Police (Receiver) Act, 1861, s. 1, provides that the person for the time being holding the office of Receiver for the metropolitan police district shall be a corporation sole and by that name shall have perpetual succession, with a capacity by his official name " to sue and be sued " and " to do " all other Acts necessary or expedient to be done in the " execution of the duties of his office." It seems to me therefore that the Receiver has possession of these moneys on behalf of the Crown and is bound to deal with them in accordance with the regulations made by the Home Secretary, and he is given power to sue and be sued wherever it is necessary or expedient that he should do so in the course of his duties.

In this case I hold that it was through the sole negligence of the defendant that the Receiver has incurred the expenses which he is claiming to recover from the defendant. The Receiver contends that it is expedient for him to sue and recover this money. It is not disputed that, under the regulations, the Receiver was bound to pay (*a*) pay and allowances amounting to

336*l.* 17*s.* 6*d.*, due to Wood during the months which expired before his service was terminated; (*b*) the repairs to the motor-cycle, which amounted to 25*l.* 5*s.* 1*d.*; and (*c*) the hospital charges of 27*l.* 10*s.* 6*d.* It is admitted that where, through the negligence of the defendant, the Receiver has incurred expenses which can be paid out of this fund, he can recover them in so far as they are an expenditure on property, and therefore the Receiver can recover the cost of repairing the motor-cycle. I am wholly unable to understand why the hospital charges should be treated differently. It is said that the Crown ought to have sued for the hospital charges through the Attorney-General, as, for example, was done in *Attorney-General* v. *Valle-Jones* (1). It seems to me wholly expedient for the Receiver to have sued in the present case, and I would refer to the judgment of MacKinnon J. in *Attorney-General* v. *Valle-Jones* (1), where he said: "As regards medical expenses and "hospital treatment, the claim for damages for these expenses "is even more simple. It is put upon the ground that the "Crown, having in fact expended the amount claimed under "this head, ought to be compensated for these expenses by the "person responsible for the negligence which rendered them "necessary." Surely this sum can be recovered only by the person out of whose funds the money has come. In this case the custodian of a public fund, holding that money on behalf of the Crown, has been obliged to make this payment under the regulations made by the Home Secretary. I have not the slightest doubt that the Receiver is entitled to recover the hospital charges on the ground that they were an expense which, as a result of the defendant's negligence, he was legally bound to incur.

Is there any real difference between the claim for the hospital charges and the claim to recover the pay and allowances? Counsel for the defence says that the latter claim must be based on loss of services, and, if a servant has been injured through some one else's negligence, the claim can only be made by a person who has been deprived of the loss of the servant's services. That is perfectly true. It was held by McCardie J. in *Fisher* v. *Oldham Corporation* (2) that police officers were servants of the Crown, and it is therefore said that the Receiver has not lost any services, because the services were rendered, not to him, but to the Crown. That also is true, but here the claim is not based on loss of service. The Receiver is saying that

(1) [1935] 2 K. B. 209, 217.

(2) [1930] 2 K. B. 364.

acting under statutory regulations, he has been compelled to cause this fund of the Crown to be depleted by a sum of 336*l.* 17*s.* 6*d.*, money which the defendant, by his negligence, has compelled him to pay for no return. That being so, he is entitled, he says, to be indemnified by the defendant, and he relies on the words of the Act that it is his duty to sue and to do all acts necessary or expedient to be done in the execution of his office. He contends that to maintain this fund and recover money which he has been forced to pay out under the regulations to no purpose are certainly acts which are expedient to be done in the execution of his office. It seems to me that this argument is sound. I think the matter comes within the principle enunciated by Lord Wright in *Brook's Wharf & Bull Wharf, Ld.* v. *Goodman Bros.* (1), which, shortly stated, is that where A. is compelled to pay money which B. is legally liable to pay, A. can recover from B., on whom the real liability rests. In the present case there is no doubt that the real legal liability for the payment of this money rests on the defendant, because his negligence was the cause of the Receiver being compelled to pay. As Lord Wright M.R., said : " The obligation is imposed " by the court simply under the circumstances of the case and " on what the court decides is just and reasonable, having " regard to the relationship of the parties. It is a debt or " obligation constituted by the act of the law, apart from " any consent or intention of the parties or any privity of " contract." That seems to me to be the principle applicable, a principle which was indicated in *Hall* v. *Hollander* (2), where a father was suing for an injury to his child, aged two and a half years, and merely based his claim on loss of service. There could be no loss of service in such a case, and the plaintiff lost, but it was said by Bayley J. at the end of his judgment : " In this case, too, it was proved that the father did not " necessarily incur any expence; if he had done so I am not " prepared to say that he could not have recovered upon a " declaration describing, as the cause of action, the obligation " of the father to incur that expence." Holroyd J. said : (3) " It was not established by evidence at the trial that the " father was necessarily put to any expence ; the court are, " therefore, not called upon to give any opinion upon his rights " to recover such expences." That is precisely the cause of action which has been submitted here, namely, that the Receiver

---

(1) [1937] 1 K. B. 534, 545.

(2) 4 B. & C. 660, 662.

(3) Ibid. 662.

1948

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* TATUM.

had necessarily incurred expense as a result of the defendant's negligence. I think the claim of the Receiver is good, and there will be judgment for him, with costs.

Solicitors for plaintiff: *Ponsford & Devenish.*
Solicitors for defendant: *A. J. Clements & Co.*

A. W. G.

C. A.

1948
Mar. 8, 9.

Tucker, Somervell and Cohen L.JJ.

OADES *v.* SPAFFORD AND ANOTHER.

Vendor and purchaser—Sale of farm—Purchaser's liability to pay "outgoing valuation" to tenant—Construction—Tenant's liability for dilapidations excluded by collateral agreement with landlord—Sum payable to tenant pro tanto increased—Estoppel.

The landlord of a farm, having given the tenant notice to quit, contracted to sell the farm to another person. The contract of sale was subject to certain general conditions of sale of which No. 7 provided that no amount should be "debited against the vendor for "any dilapidations . . . . prior to the date of the contract," and to special conditions, of which No. 10 provided that "in addition "to the purchase money, the purchaser shall pay the outgoing "valuation due to the tenant." By an agreement collateral to the tenancy agreement, landlord and tenant had agreed that the tenant should not be liable for dilapidations in accordance with the tenancy agreement unless and until the landlord had himself put the buildings into repair. The landlord had never done so and accordingly was unable to reduce by set-off for dilapidations the amount payable by him to the tenant for tenant right. By an innocent omission, the landlord produced to the purchaser the tenancy agreement as representing the terms of the agreement between himself and the tenant, but failed to disclose the collateral agreement. The purchaser accordingly agreed, on the basis that the tenant would be liable for dilapidations, to the purchase price demanded by the landlord. In the tenant's proceedings for the value of his tenant right the landlord claimed from the purchaser the equivalent of the sum which the landlord might be found liable to pay the tenant for tenant right.

Held (1.) that special cond. 10 must not be construed with regard to general cond. 7 as imposing an obligation on the purchaser to pay the amount due to the tenant for tenant right without reference to any liability of the tenant for dilapidations, as the special condition must prevail over the general condition in so far as the two were inconsistent; (2.) that the words "outgoing valuation" in special cond. 10 meant whatever sum might prove payable by

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

the landlord to the outgoing tenant after balancing their liabilities to each other including the tenant's liability, if any, in respect of dilapidations : *Dalton* v. *Pickard* [1926] 2 K. B. 545 applied ; and (3.) that, as the landlord had represented that the tenancy agreement stated the whole of the agreement between himself and the tenant and had failed to disclose to the purchaser that the tenant was relieved by the collateral agreement of his liability in respect of dilapidations, so that the sum payable to the tenant by way of " outgoing valuation " was pro tanto increased, the landlord was estopped from claiming from the purchaser so much of the sum payable to the tenant as could have been set off by the landlord for dilapidations but for the collateral agreement.

APPEAL from Gainsborough county court.

The plaintiff was the outgoing tenant of a farm at Misterton, Nottinghamshire, of which one defendant was the landlord. The landlord had given the tenant notice to quit expiring on April 6, 1942, and the tenant brought these proceedings in respect of his claim for tenant-right. On March 13, 1942, after negotiations, the landlord entered into a contract to sell the farm to the other defendant for 1,600*l*. subject to the special conditions of sale and the common-form conditions of sale of the Lincolnshire Incorporated Law Society. Special cond. 10 provided : " in addition to the purchase money, the purchaser " shall pay the outgoing valuation due to the tenant." It was provided by the common-form conditions that in case of inconsistency the special conditions were to prevail, and, by common-form cond. 7, that the vendor of an agricultural holding within the Agricultural Holdings Act, 1923, was to be treated as an outgoing tenant and the purchaser as a landlord and that the purchaser must accordingly pay the vendor, on completion, all money payable to an outgoing tenant by the landlord for various specified matters " but no amount shall " be debited against the vendor for any dilapidations . . . . " prior to the date of the contract."

The tenant went out on April 6, 1942, and the contract of sale was completed on the twenty-fourth. The tenant made a claim in the county court against the landlord in respect of tenant-right, and the judge held him entitled to recover a sum to be found due by an assessor or to be agreed. During the hearing of the tenant's claim it emerged that on his taking the farm he had entered into an agreement with the landlord, collateral to the tenancy agreement, that the clauses of the latter agreement rendering the tenant liable for dilapidations were not to be effective unless and until the landlord himself put the buildings into proper repair. The landlord, never having done that, was accordingly not entitled to any set off against the tenant in respect of dilapidations, so that the tenant was entitled to a larger sum than would normally have been due to him.

The landlord claimed against the purchaser in these proceedings under special cond. 10 that sum so payable by him (the landlord) to the outgoing tenant, contending that, under that condition, the purchaser must pay the actual sum payable by the landlord to the outgoing tenant. The purchaser contended before the county court judge that the landlord was estopped from setting up any agreement between him and the outgoing tenant other than the tenancy agreement, with its ordinary provision for dilapidations, which had been shown to him (the purchaser) during the negotiations for purchase of the farm, and on which he had relied as stating the actual agreement between the landlord and his tenant and as a basis for his offer ot 1,600*l.* for the farm. He claimed to be liable to pay the outgoing tenant only what the landlord was found liable to pay that tenant less the cost of putting the premises into repair.

The county court judge held the purchaser liable to pay the landlord the sum actually payable by the latter to the outgoing tenant. The purchaser appealed.

Lightman for the purchaser.
Platts Mills for the landlord.

The arguments are sufficiently indicated in the judgment of TUCKER L.J.

TUCKER L.J. The whole of this appeal, in my view, turns on two points. Mr. Platts Mills, for the landlord, contended first, on the construction of special cond. 10 of the contract of sale, and quite apart from any question of estoppel, that the purchaser was undertaking to pay such sum as might be found to be due by the landlord to the outgoing tenant for tenant-right. He argued that the words in special cond. 10: "In "addition to the purchase money the purchaser shall pay the "outgoing valuation due to the tenant," mean nothing more or less than "shall pay what is due in respect of tenant-right"; and that, apart altogether from any oral agreement between the tenant and the landlord, the contract of sale, by virtue of special cond. 10, simply provided for payment by the purchaser to the landlord of such sum as was due from the landlord to the outgoing tenant, without any set-off or deduction for dilapidations. Counsel gave as the ground for that interpretation that this was a sale as between a vendor in occupation and a purchaser, and that the parties were contracting on that basis, so that the rights and obligations as between the vendor-landlord and his tenant, whatever they might be, did not enter into the matter at all; and he argued that No. 7 (*a*) of the common-form or general conditions applies, that it expressly says that, where the vendor is in occupation, then as between vendor and purchaser no amount shall be debited against the vendor for any dilapidations, that special cond. 10 must be construed in the light of general cond. 7 (*a*), and that in effect this is merely a contract to pay for the tenant-right.

First, I can find no evidence that the landlord, the vendor, was at the material time in occupation of the farm. That by itself would, in my view, be sufficient to exclude general cond. 7 (*a*). However that may be, if there is any conflict between special cond. 10 and general cond. 7 (*a*). it is the special condition which must prevail. I think that, in the circumstances of this case, where the parties were negotiating on the basis that there was at the time in fact a tenant of the farm who was going out, special cond. 10 must be regarded as the overriding or governing condition. On the true interpretation of that condition, the purchaser was, in my opinion, agreeing to pay whatever should be found to be due on balance as between landlord and outgoing tenant. It is quite clear that as between landlord and tenant a valuation involves balancing on one side the payment due from the tenant for dilapidations and, on the other side, sums due from the landlord to the tenant for tenant-right, and so forth. Counsel referred to *Dalton* v. *Pickard* (1), a case in this court which appears as a note to *Richmond* v. *Savill* (2). In *Dalton* v. *Pickard* (3) the tenant had written "I am willing to give up the whole of my holding known as "'Tonford Farm' at Michaelmas next providing I am allowed "fair valuation, and the whole of my live and dead stock "to be included in the valuation, and also an allowance of a "half-year's rent." That proposal was accepted, and the tenant went out. The parties went to arbitration under the Agricultural Holdings Act, and the landlords put in a schedule of dilapidations. The tenant protested that when he entered into the agreement he understood that he was to get, as consideration for the surrender, the value of his live and dead stock

(1) [1926] 2 K. B. 545 *n*.

(2) [1926] 2 K. B. 530.

(3) [1926] 2 K. B. 546, 547.

and half a year's rent free of all costs, claims and dilapidations. He said that if he had known that claims were going to be made against him for dilapidations he would never have surrendered. Vaughan Williams L.J., in the course of his judgment, said (1): "I see nothing in those letters which deprives the landlords of "any of their rights, on the valuation being taken, to bring in "their claim for dilapidations or for bad cultivation. It is "quite plain that the tenant, by his own letter, anticipates "that there will be a valuation. A valuation is a very well-"known thing in agriculture, and there are always two sides "to the matter. There is the landlords' claim, and there is "the tenant's claim, and then the balance is what ultimately "has to be paid." I think that the landlord and the purchaser in the present case were contracting in terms of the sum payable, whatever it might turn out to be, as between the landlord, and the outgoing tenant, and that that is the true meaning to be attached to the words "outgoing valuation due to the "tenant" in special cond. 10.

That being so, it is necessary to consider the defence of estoppel relied on by the purchaser. The county court judge, in his judgment, said: "The landlord claims against the "purchaser indemnity—form of indemnity—claiming under "his agreement—purchase agreement—to be paid by the "purchaser the amount he has to pay to the tenant. The "clause in the agreement is clause 10 which covers this case. "The contract between the vendor and the purchaser means "shall pay to the landlord the outgoing valuation the landlord "has to pay to the tenant. The point taken on behalf of the "purchaser is: 'I knew nothing about this oral agreement "'about repairs. Therefore, though the landlord can't set "'off against the outgoing tenant the amount of dilapidation, "'I am entitled to set off against the landlord the amount of "'the dilapidations.' The facts are these. When the pur-"chaser was negotiating he asked what the terms of the tenancy "were and he was shown the written agreement and nothing "was said to him about there being any term or collateral "agreement whereby conditions in agreement not fully "effective." Then the judge goes on to say that, as fraud is not relied on, the purchaser cannot succeed with regard to that part of his defence which is based on innocent misrepresentation or breach of warranty. On the defence of estoppel he said: "Another point taken by Mr. Bains [for the purchaser] is,

---

(1) [1926] 2 K. B. 546, 547.

"having represented that the terms of the tenancy contained "in the tenancy agreement were the effective terms under "which the tenant held, the landlord cannot now say that they "were not effective terms. Therefore, the valuation between "the purchaser and the landlord must be made on the basis "that those were the terms, that the purchaser is entitled "between himself and the landlord to have the valuation made "on the basis that the tenant is liable for damages, therefore "the valuation should be either reduced or wiped out." The note goes on: "This is a sound and convincing argument," but I think, in view of the judge's ultimate decision, that this is a slip in the transcript, and that what he must have said is "This sounds a convincing argument." The judge read the contract, and continued: "This means the tenant-right valuation without dilapidations. If the purchaser is not "entitled to claim damages the purchaser cannot read clause 10 "as if the terms of the tenancy had been such 'as you repre-"'sented them to me.' Estoppel does not seem to me to avail "him." I confess that I am not quite clear in my own mind as to the precise basis on which the judge is rejecting the estoppel argument, but, however that may be, I read his judgment as containing a finding that, during the negotiations, it was represented by the landlord to the purchaser that the terms of the agreement between the landlord and the tenant were those contained in the tenancy agreement which he, there and then, handed to the purchaser to see. In my view, that is a sufficient finding to enable the purchaser to succeed. It is true that, in order to establish estoppel, he must prove a representation of fact which the landlord intended to be acted on, that it was in fact acted on by him (the purchaser) to his detriment, and that the representation was in fact untrue. I think that all those ingredients, necessary in an estoppel, are established in the present case. The whole matter turned on what was the agreement between the landlord and the outgoing tenant. It was in respect of the liability, whatever it might be, of the landlord to the tenant that the purchaser was being called upon to pay, and, accordingly, when he asks to see the relevant contract—and is shown a tenancy agreement, but is not told of the existence of the collateral oral agreement which has the effect of altering the whole import of the tenancy agreement, then, it seems to me, the landlord is estopped from saying that the real agreement between himself and the tenant is contained in anything other than the tenancy agreement which he produced to the purchaser. Although the defence of estoppel must always be very carefully considered, because the word estoppel is very often loosely used, I think that the purchaser here has succeeded in showing all the necessary ingredients. I think that, on the uncontradicted evidence, it is impossible to draw any conclusion other than that the representation was made, was made with the intention that it should be acted upon, and was in fact acted and relied upon by the purchaser to his detriment. Throughout these proceedings it has been accepted on all sides that the landlord's failure to tell the purchaser of the existence of this collateral arrangement was due to the fact that it had passed out of his mind altogether. Otherwise, of course, it would have been a case of fraud, and would, no doubt, have been so framed.

I therefore think that this appeal succeeds and that the order made by the county court judge will have to be varied.

SOMERVELL L.J. I agree. I do not desire to add anything with regard to the relationship between general cond. 7 and special cond. 10. Also I wholly agree with regard to the construction of the words " pay the outgoing valuation due to the " tenant " in special cond. 10.

The issue of estoppel is one, as my brother has said, which always requires careful consideration. The judge sets out that the purchaser asked for the terms of the tenancy, that he was shown the written agreement, and that nothing was said to him about any collateral bargain whereby the conditions in the agreement were not wholly effective. I think that if one restricts oneself to this brief note of the finding, one can imagine cases in which the party (in this case the purchaser) relying on the type of estoppel on which he does rely might well fail to make out his case. If, for example, the landlord, the vendor here, had reason to think that the tenancy agreement was merely required in order that the prospective purchaser might look at some particular matter in it—for example, the date when it came to an end, then the purchaser might not be able to rely on that alone as a representation with regard to some other part of the tenancy agreement on which, if the attention of the landlord had been drawn to the matter, he might have made some qualification or added some relevant matter. I think, however, that the evidence here makes it plain that this issue of dilapidations, and the tenant's liability for them as a factor which would enter into the outgoing valuation due to the tenant, were present to the minds of both the purchaser and the landlord, and were discussed between them. I think that the judge's very brief note of his finding may be read in the light of this unchallenged evidence, and I agree that the defence of estoppel is made out.

COHEN L.J. I agree. As we are differing from the county court judge, I will quite shortly state the reasons for my conclusions. As I read his judgment we are differing from him only on one point, that is, the construction of special cond. 10 of the contract of March 13, 1942. As I understand it, the county court judge found, first, that there was an innocent misrepresentation which he summarizes; secondly, that that innocent misrepresentation cannot found a claim for damages; and, thirdly, that the purchaser cannot, under the guise of breach of warranty, claim damages for innocent misrepresentation. With all these conclusions I agree, and I do not think that Mr. Lightman, for the purchaser, sought to dispute them, either on fact or in law. The judge then turned to the defence of estoppel and rejected it, not on the ground, as I read his judgment, that the misrepresentation in question could not found an estoppel, but because, as he construed special cond. 10, the effect of it was to bind the purchaser to pay the tenant-right due to the outgoing tenant. If I had agreed with that construction, I should have agreed with the judge's conclusion on the issue of estoppel, for on that construction any misrepresentation as to dilapidations would have been immaterial; but I am unable to construe special cond. 10 in the sense in which the judge appears to have construed it. I agree with my brethren that the effect of that condition is to exclude the operation of general cond. 7. I doubt whether that condition was ever applicable to the facts of this case. I agree with my brother Tucker that, on a consideration of the agreement in the light of the surrounding circumstances, the landlord was never in occupation of this agricultural holding. I think that any doubt is removed by special cond. 10 which substituted for any obligation which might have existed under general cond. 7 the obligation to pay the amount of the outgoing valuation due to the tenant. I do not wish to discuss the question of construction in detail. It is sufficient to say that I read cond. 10 as my brethren do, in the sense that outgoing valuation means such an outgoing valuation as was indicated in *Dalton* v. *Pickard* (1).

Having reached this conclusion on construction, I agree with my brethren that the representations which are found by the judge to have been made are vital and are sufficient to found estoppel. I agree that the appeal should be allowed.

The court ordered as follows: That the issue between the defendants do proceed to trial in accordance with the following directions: (1.) In ascertaining the amount of the outgoing valuation referred to in cl. 10 of the special conditions of sale of the agreement dated March 13, 1942, there should be credited the amount of the tenant-right to which the plaintiff is entitled, and there should be debited the sums for which the plaintiff would have been liable for breaches of covenant on the part of the plaintiff contained in the tenancy agreement dated March 7, 1938, if all the covenants and provisions of the said agreement had been operative; (2.) and if there is a credit balance on such valuation the defendant [purchaser] is to pay such balance to the defendant [landlord] together with the said [landlord's] costs of the said issue, but if there is a debit balance on such valuation, there is to be judgment for the defendant [purchaser] on the said issue with costs.

Appeal allowed.

Solicitors for the purchaser: *Sharpe, Pritchard & Co., for W. Bains, Brigg.*

Solicitors for the landlord: *Collyer-Bristow & Co., for Hayes, Son & Richmond, Gainsborough.*

---

(1) [1926] 2 K. B. 545 *n.*

Distinguished. HARRISON *v.* HOPKINS. [1949] 2 All E.R. 597. | *Applied.* WETHERALL & CO., LTD. *v.* STONE. [1950] 2 All E.R. 1209.

C. A.

McINTYRE AND ANOTHER *v.* HARDCASTLE.

1948
Mar. 17, 18.

Tucker and Somervell L.JJ. and Roxburgh J.

Landlord and tenant—Rent restriction—Joint owners of dwelling-house—House required for occupation by one owner—Application by owners—Validity—Suitable alternative accommodation—Insufficiency for all tenant's furniture—Whether surplus of furniture relevant per se—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-ss.* 1, 3, *sch I., para.* (*h*).

Where two or more joint beneficial owners of a house within the Rent Restriction Acts claim possession of it under para. (*h*) of

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

C. A.
1948
McIntyre
v.
Hardcastle.

sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the paragraph, on its true construction, should be read as follows: in sub-para. (i.) for "himself" read "themselves"; in sub-para. (ii.) for "any son or daughter of his" read "any son or daughter of theirs"; and in sub-para. (iii.) for

---

(1) By s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "1. No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(*a*) the court has power so to do under the provisions set out in the First Schedule to this Act; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect .... 3. Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—(*a*) of a dwelling-house to which the principal Acts apply; or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—(i.) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or (ii.) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character."

By sch. I.: "A court shall, for the purposes of section 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if .... (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein "after" a certain date) "for occupation as a residence for—(i.) himself; or (ii.) any son or daughter of his over eighteen years of age; or (iii.) his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in paragraph (*h*) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

C. A.

1948

McIntyre
v.
Hardcastle.

" his " read " their " father or mother. Where, so read, none of those sub-paragraphs applies to the facts of the case, the application by the beneficial owners for possession must fail.

Where, therefore, two sisters, joint owners of a house within the Acts, sought possession of the house under para. (*h*) on the ground that the house was required as a residence for one of them:—

Held, that the case was not within the paragraph and that no order for possession could be made under it.

Dictum of Asquith L.J. in *Baker* v. *Lewis* [1947] K. B. 186, 193 adopted.

The landlords claimed possession in the alternative under s. 3 of the Act of 1933, offering the tenant as alternative accommodation some of the rooms in the house in question. The county court judge, who rejected the claim under para. (*h*), rejected also the alternative claim, the only ground for so doing which he gave being that the alternative accommodation offered was not suitable because not suitable in extent in that the tenant would have to compress his furniture and belongings.

Held that, as the county court judge had based his decision on the claim under s. 3 only on the ground that the alternative accommodation would not take all the furniture which the tenant had, the case must be remitted to him for reconsideration with reference also to other matters, such as the tenant's needs due to the fact that he had to work at home and, in particular, his special requirements with regard to any specified items of furniture.

Quaere, whether the mere fact that the tenant would be left with furniture which was surplus in the sense that there was no room for it in the reduced accommodation offered, in other words, whether surplus furniture per se, would be relevant in determining whether that alternative accommodation was to be deemed suitable under s. 3, sub-s. 3.

Appeal from Wargrave county court.

The plaintiffs, two married sisters, were joint legal and beneficial owners of The Cottage, Benson, a house within the Rent Restriction Acts. Having duly determined the contractual tenancy, they brought this action against the tenant claiming possession under para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1) on the ground that the house was required for occupation as a residence by one of the landlords. They claimed in the alternative under s. 3 of the Act (1), offering the tenant as alternative accommodation some of the rooms in the house in question.

The county court judge held that para. (*h*) was not applicable to the claim by landlords where only one of them required the house for his own occupation, and also dismissed the claim under s. 3, giving as his reason for so doing that the alternative accommodation offered was not suitable under s. 3, sub-s. 3,

(1) See previous page.

because not suitable in extent in that the tenant would have to compress his furniture and belongings. The landlords appealed.

Ackner for the landlords. Where a dwelling-house is owned by two or more persons jointly, they are entitled to apply for possession under para. (*h*) of sch. I. to the Act of 1933 even though only one of them requires the house for his occupation. In *Baker* v. *Lewis* (1) it was held that the word " landlord " included joint owners. There the joint owners of a house were claiming under para. (*h*) possession of a house which they both wanted to occupy, whereas here possession is required for occupation by only one of the landlords. Somervell L.J. (2) indicated, obiter, a view that para. (*h*) would cover a case where A., B. and C., being joint owners, claimed possession of a house because it was required for occupation by A. only. Asquith L.J. (2) expressed a view which the county court judge regarded as opposed to that of Somervell L.J. MacKinnon L.J.'s judgment in *Sharpe* v. *Nicholls* (3) is to be read as implying that the two owners of the house there could have applied for possession for the purpose of its occupation by one of them if they had been beneficial owners and not mere personal representatives.

[Somervell L.J. I do not so read that judgment.] [*Parker* v. *Rosenberg* (4) referred to.]

If the court is against the landlords on this point, the effect will be that para. (*h*) can never be available to joint owners of a house unless there is room for them all in it and they are all ready to change their residence.

[Somervell L.J. The question is whether para. (*h*) is so worded as to cover a case like this. Asquith L.J. in *Baker* v. *Lewis* (2) thought not. Wording necessary to cover this case seems absent.]

The intention of the legislature was to give the landlord possession of the house where hardship was on him. The only exception envisaged under para. (*h*) is where he has become landlord by purchase after a certain date. If the legislature had wished to make any other exceptions it would surely have added them to the exception referred to.

[Somervell L.J. That argument is valid only if the legislature was contemplating more than one landlord under

(1) [1947] K. B. 186.
(2) Ibid. 193.
(3) [1945] K. B. 382.
(4) (1947) 63 T. L. R. 53.

the paragraph. The question is whether the paragraph is capable of such a construction having regard to the Interpretation Act.]

The legislature must have had a case like the present in mind, because the difficulty can easily be circumvented by a deed of gift executed by the one joint owner in favour of the other.

The landlords have a good case apart from para. (*h*), because they have offered the tenant suitable alternative accommodation within the meaning of s. 3 of the Act of 1933. The county court judge, while holding that the accommodation offered was suitable to the needs of the tenant, ended his judgment by saying that it was not suitable in extent because the tenant would have to compress his furniture and belongings. The Act of 1933 requires provision of accommodation suitable to the tenant's domestic requirements, but not necessarily such as to accommodate all the furniture that the tenant now has with him. If the accommodation is sufficient to house the tenant and his family reasonably, the fact that he may have too much furniture, or that some of it may be too big for the alternative accommodation, is irrelevant. The question of furniture was the only circumstance suggested by the judge as rendering unsuitable the alternative accommodation offered. [*Middlesex County Council* v. *Hall* (1) and *Briddon* v. *George* (2) referred to.] The underlying principle is that suitable alternative accommodation shall be provided for the tenant and his family; the object is merely to get a roof over the tenant's head.

[Somervell L.J. But suppose that a tenant has to do a lot of his work at home, surely the county court judge is entitled to take that into consideration? It is a need of the tenant.]

The needs to be taken into consideration under s. 3, sub-s. 3 of the Act of 1933 are the domestic needs of the tenant.

[Tucker L.J. But s. 3 specifies several matters to be taken into consideration, for example, proximity to the tenant's place of work. Here the tenant has to do his work and live in his home, and the question is whether the alternative accommodation offered is sufficient for both purposes.]

Furniture can be taken into consideration on the question of hardship or reasonableness, but not on the question of extent of accommodation. The Act only requires the accommodation to be extensive enough for the tenant's ordinary needs, not for his superfluous furniture. The county court judge has allowed him accommodation for both. [*Stewart* v. *Mackay* (1) referred to.] On the question of hardship, he took the furniture into consideration and decided in favour of the tenant. He has in any event misdirected himself in applying his mind only to the question of furniture, for his only criticism of the alternative accommodation offered was its inability to house all the tenant's belongings. The landlords' only obligation under the Act, however, is to provide the tenant with a sufficient habitation. The latter is not entitled to demand an alternative house as good in all respects as that which he has. If the county court judge wished to bring in the question of furniture he should have mentioned it under reasonableness or hardship, whereas he did not mention it in either of those connexions. It cannot, therefore, have struck him as a factor of very great importance.

---

(1) [1929] 2 K. B. 110.

(2) (1946) 174 L. T. 380.

Samuel-Gibbon for the tenant. The standard contemplated by the Act of 1933 in para. (*h*) of sch. I. is wholly different from that contemplated in s. 3, sub-s. 3. Under the paragraph the court is concerned with "other accommodation," but under s. 3, sub-s. 3, with "suitable alternative accommodation" as defined. The county court judge was right in finding as a fact that the alternative accommodation offered was not suitable in extent and, further, did not constitute suitable alternative accommodation under s. 3, sub-s. 3. There is a clear finding to that effect in the judgment. Unless he misdirected himself in some way, his finding must stand. Reference is made to furniture surplus to the tenant's requirements; but there is no evidence that any of it is surplus.

[Tucker L.J. The landlords' point is that the tenant is not entitled to demand that the alternative accommodation shall be enough to take more furniture than he needs to constitute a reasonably furnished house.]

Bucknill L.J. refers in *Selwyn* v. *Hamill* (2) to the question of crowding of furniture. It is wrong to say that it is a misdirection of himself for the county court judge even to have considered the question of furniture under s. 3, sub-s. 3. It is a matter to be taken into consideration under the sub-section. *Briddon* v. *George* (3) is a different case, for a motor-car is not furniture. It cannot be right to say that the question of "lares et penates" is to be excluded under s. 3, sub-s. 3. It is

---

(1) 1947 S. C. 287.
(2) [1948] 1 All E. R. 70, 72.
(3) 174 L. T. 380.

C. A.
1948
McIntyre
v.
Hardcastle.

a matter of degree, and, therefore, one of fact. It was essentially a matter for the judge's decision, on abundant evidence. The fact that he was considering furniture only under s. 3, sub-s. 3, does not entitle this court to say that he misdirected himself. The matter does not rest there, however: the judge's finding is that the alternative accommodation offered is not suitable in extent; but he is not, in making that finding, confining himself to furniture: he had also the matter of drainage in view. While the factor of furniture would by itself have been sufficient to support that finding, there is no indication that he had only furniture in mind in speaking of extensiveness. [*Sims* v. *Wilson* (1) referred to.]

As for the question whether these landlords can apply under para. (*h*) for possession for one of them, the singular has been held to include the plural. "Himself" is co-extensive with landlord. Therefore "landlords" must be followed by "themselves." To construe the paragraph as permitting "landlords" to be followed by "for himself" would mean that "landlord" was being used with two different meanings in the same sentence. To succeed in their application under para. (*h*) the landlords must first show that the paragraph is to be construed as permitting an application by landlords for possession for any one or more of them. There is no warrant for reading such words into the paragraph.

Ackner in reply. The word "landlord" in para. (*h*) is meant to include persons who are clearly within his interest in the premises, for example, sons and daughters. Thus, when the proviso to the paragraph speaks of accommodation as being "available for the landlord" it means available both for the landlord and for those whom he wishes to put into the house. It is clearly contrary to the policy of the Rent Restriction Acts not to read into para. (*h*) the words necessary to make it cover a case like this. Such words ought therefore to be read in, and the word landlords, in the plural, should be construed as "landlords or any one of them."

Tucker L.J. The claim under para. (*h*) presented this point of law for determination to the county court judge: this court has held that the word "landlord" in the opening sentence of para. (*h*), by reason of the Interpretation Act, includes the plural where there is more than one. The question therefore arose whether these landlords, since they are more than one, have to prove, on a claim under that paragraph, that the dwelling-house is required for occupation as a residence by all of them or by any one or more, for it is only one of the landlords who desires to reside in the house. The point was taken that the landlords had not brought themselves within para. (*h*) because in order to come within it they had to show that the dwelling-house was required for occupation as a residence by both of them.

---

(1) (1946) 62 T. L. R. 485.

This question arises for decision here for the first time, but it was referred to by way of obiter dictum in *Baker* v. *Lewis* (1). There, Somervell L.J. who wished to keep this question open, said (2): "I am not in any way implying or suggesting that "this para. (*h*) is only applicable in the case of joint owners "where they are desiring the dwelling-house for occupation "as a residence for them all." Then he went on to say that he was inclined to the view that it had a wider application and would cover the case where A., B. and C., being joint owners, put forward a claim for possession, in the circumstances in which it would arise, alleging that the residence was required for occupation as a residence by A. He added that he only mentioned that in case any misunderstanding should arise through anybody's suggesting that the decision in that case impliedly limited para. (*h*) to cases with facts like those of that case. Asquith L.J., in his judgment, referred to those observations of Somervell L.J. and continued (2): "This court "has decided, in *Owen* v. *Overy* (3), that 'landlord' in "para. (*h*) of sch. I. to the Act of 1933 covers two or more "joint beneficial owners, and in *Sharpe* v. *Nicholls* (4) "that it does not cover two or more bare personal repre"sentatives. Where there are two or more joint beneficial "owners, I would incline to a construction of (*h*) narrower "than put forward, or kept open, by my brother. In the "event, (i.), (ii) and (iii.) of (*h*) should, I think, be read as "follows: in (i.), for 'himself' read 'themselves'; in (ii.), "for 'any son or daughter of his' read 'any son or daughter "'of theirs,' and in (iii.), read 'their father or mother.' Where, "read in this way, neither (i.), (ii.) nor (iii.) has any applica"tion, such beneficial owners would fail—for instance, if they "proceed under (ii.) and are not a married couple with a child,

---

(1) [1947] 1 K. B. 186.
(2) Ibid. 193.
(3) (1946) Not reported. C. A. October 25.
(4) [1945] K. B. 382.

C. A.

1948

McIntyre v. Hardcastle.

Tucker L.J.

"or if they proceed under (iii.) and have not got a parent in "common; but they would fail in that case not because "there are several of them or because they are not a 'landlord' "within the opening words of the section, but because they "could not bring themselves within the language of (i.), (ii.) "or (iii.), construed in the way I suggest." This authority was cited to the county court judge, and, having referred to those passages, he said: "Both of these opinions were obiter "to that decision . . . . I take the view of Asquith L.J., "and hold that the landlords fail to come within para. (*h*) on "which they rely."

All kinds of difficulties hve been suggested to us as likely to follow whichever interpretation is accepted by us. I do not think that the legislature really contemplated this situation when this paragraph was framed. Therefore, I feel driven to interpret it merely in the light of the actual language used. Looking at it in that way, I feel convinced that the interpretation put upon it by Asquith L.J. was the correct one, and I will not attempt to put into better language what he so clearly expressed in the passage just quoted. I therefore think that the county court judge came to a right decision on this matter.

It was suggested that the word "landlord" must be given a somewhat different interpretation in the proviso to para. (*h*) from that which it bears in the opening words of the paragraph, and that that strengthens the landlord's plea that we should read words into (i.), (ii.) and (iii.) which precede the proviso. I do not, however, think it necessary to give the word "land-"lord" in the proviso any different meaning from that which it bears in the opening words of the paragraph. It is quite true, as I think, that the hardship and the accommodation which has to be available are primarily considered with reference to the person who is going to occupy the premises, but I think that the words "available for the landlord" mean available for the persons who are landlords and who require the premises for occupation by any one of the persons previously named. I do not think that reference to the proviso really helps us in interpreting the words of (i.), (ii.) and (iii.).

The judge then considered the question, in case he should be held to be wrong in law, of reasonableness and relative hardship on the tenant and on the landlord, and he stated that if he were wrong on the question of law he would make an order for possession because, he thought, the tenant had not shown that greater hardship would result to him if the order were made than if it were refused. He further held that it was reasonable to make the order, but, having regard to his interpretation of para. (*h*), he decided in favour of the tenant.

After he had given his judgment, counsel for the landlords intervened to suggest that he had not disposed of the alternative claim under s. 3, sub-s. 3. In reply to that intervention, according to the note taken by Mr. Ackner, the judge said: "There is not suitable alternative accommodation. It is "not suitable in extent. Tenant would have to compress "furniture and belongings."

After notice of appeal had been given, and in view of a contemplated appeal, a shorthand note taken of the judge's judgment by a newspaper reporter was approved by the judge with one or two slight amendments. It is agreed between counsel that this note of what occurred after the judgment had been given is accurate. I think it perhaps unfortunate that the judge has not had an opportunity of considering it, too, having regard to the fact that he has considered the judgment which he gave in the first instance. I must consider the case on the basis that this is an accurate representation of what he said and an indication of how he applied his mind to the question under s. 3, sub-s. 3. It is, of course, necessary in that connexion to look at the whole of his judgment on the other part of the case. From that point of view, it is quite clear that in several places he is drawing a clear distinction between the matters which he has to consider under para. (*h*) and under s. 3, sub-s. 3, as regards reasonableness, hardship and availability of other accommodation. For instance, he says: "In dealing with that question of hardship, among the con-"siderations I have taken into account are the existence of "alternative accommodation. That alternative accommo-"dation does not mean that which would fall under the "definition of alternative accommodation in s. 3, sub-s. 1 (*b*), "and s. 3, sub-s. 3, of the Act of 1933. All that it means "is that the court has to be satisfied that there is some reason-"able place where the tenant could go. If there is somewhere "the tenant could go the court has to assess its suitability." Later he said: "Is the offer she makes to give certain accom-"modation a factor which puts hardship on her if I refuse to "make an order much greater upon her than upon him? "Undoubtedly it does. It is somewhere he can go, and that "is all I have to consider under para. (*h*)." We are told by

C. A.

1948

McINTYRE v. HARDCASTLE.

Tucker L.J.

counsel that he added these words: "It is not enough under "s. 3, sub-s. 3, but it is enough under para. (*h*)." So the judge clearly had in mind, in giving his judgment, the distinction between the requirements of para. (*h*) and those of s. 3. Nevertheless, nowhere in the judgment does he express any view as to the landlords' claim under s. 3, sub-s. 3. The whole of the judgment, as I read it, relates to the claim under para. (*h*), on which paragraph he came to the conclusion already indicated.

With regard to the claim under s. 3, sub-s. 3, the landlords had offered as alternative accommodation some of the rooms in the house where the tenant was. The premises consisted of the following: downstairs: two sitting rooms, kitchen, two cloak rooms and entrances, front, side and back, brick-built outhouse used as kitchen. Upstairs: four bedrooms, bath-room, attic and box-room. The offer to the tenant was the present dining room and lavatory forming a self-contained block to the side entrance together with the kitchen, and, on the first floor, the largest bedroom and joint user of the bathroom; rent, rates, etc., to be mutually agreed. The tenant lived with his wife in this house. He is in command of the local cadet force, and has to travel a good distance in the performance of his duties. He also requires the house for conferences and work in connexion with his military duties. I think that the judge, on Mr. Ackner's intervention, was indicating as his reason for refusing to make an order for possession that he considered the alternative accommodation offered not suitable in extent because the tenant would have to compress his furniture and belongings if he accepted the offer. It is argued that it is possible, if the judgment be read as a whole, that there were other reasons which might have actuated him in saying that the alternative accommodation was not suitable in extent, for questions had been raised with regard to the drainage and also to the requirements of the tenant in connexion with his cadet-corps duties. I do not think that the judge considered those matters as influencing his decision under s. 3, sub-s. 3. As regards the drainage, his finding under para. (*h*) that the offer made by the landlords was a reasonable one which the tenant ought to have accepted would have been impossible if he had thought there was anything wrong with the drainage or that it was not sufficient to serve the number of people who would be occupying the premises. I am reluctantly driven to the view that, having in his judgment really overlooked this claim under s. 3, sub-s. 3, the judge slipped into an error when Mr. Ackner intervened, and thought the alternative accommodation not suitable in extent merely because it would not accommodate all the furniture which the tenant had. I think that that must have been an error in the circumstances of this case, because the accommodation in this house, as I have already indicated, consisted of two sitting-rooms, a kitchen, etc., downstairs, and four bedrooms upstairs. The tenant had said in his evidence that all the rooms were fully furnished, that much of it was fairly large and that he had had to get rid of surplus which he could not get into the house. He was thus indicating the difficulty in which he would be if he had still further to curtail his furniture. Therefore, I think that the judge must have been having regard to that and must have been taking the view that the alternative accommodation was not suitable because it would not take in the surplus furniture, so to speak, which was then in these other rooms into which the landlords would go.

In the result, I think that on the second point the case ought to go back to the county court judge for a fresh trial confined to the landlords' claim under s. 3, sub-ss. 1 (*b*) and 3.

Somervell L.J. I agree with the course which my brother Tucker has suggested. Throughout the argument I was doubtful whether Mr. Ackner had discharged the onus of satisfying us that the county court judge misdirected himself in the decision to which he came on the second issue. As my brother has pointed out (and I think that this was very unfortunate), the note which had been made was not submitted to him so that we could have the advantage of any additions or amplifications which he might have desired to make to it. It may be that he did consider all relevant matters, but, for the reasons which my brother has given—and we have to act on the material before us—I agree with the course which he has proposed.

Roxburgh J. I agree.

Samuel-Gibbon. My friend and I are in doubt as to the exact effect of the court's order in relation to the hearing, in particular, whether the county court judge was to take the decision as being that furniture was altogether irrelevant and must not be taken into account, or whether he was entitled to take it into account, although it was not by itself sufficient. How is the judge to direct his mind with regard to that matter ?

Tucker L.J. What I intended to indicate was that, in the circumstances of this particular case, I thought that the judge had taken into consideration the question of what I call surplus furniture—that he must have been considering surplus furniture as a whole which would otherwise have to be stored. I was not intending to express any view, nor do I think it desirable, in the present state of this case, to express any view whether furniture per se must necessarily always be excluded in considering suitable alternative accommodation under s. 3. That all those matters are proper to be taken into consideration under the question of reasonableness is common ground ; but, with reference solely to the alternative accommodation under s. 3, my view was that the county court judge must have been considering what I call the surplus furniture as a whole, no evidence having been given as to the special requirements of the tenant with regard to any particular items of furniture. In the circumstances of this case, having regard to the evidence that had been given, I thought that the judge had misdirected himself in his view with regard to the furniture. I am not prepared to say that the existence of furniture can never be taken into consideration when a question under s. 3, sub-s. 3, arises.

Somervell L.J. I entirely agree with what has just fallen from my brother. I agreed with the decision because I accepted the view that on that note it looked as if the judge had based his decision under s. 3, sub-s. 3, exclusively on the question of surplus furniture. If that is so, I think it was wrong. I desire to express no opinion as to the extent to which, as my brother has said, the matter may be taken into account under s. 3, sub-s. 3.

Appeal allowed.
Case remitted.

Solicitors for the landlords : *Wedlake, Letts and Birds.*
Solicitors for the tenant : *Curwen, Carter and Evans.*

Re DICKSON.
Re LOCAL GOVERNMENT ACT, 1933.

C. A.

1948
Feb. 17, 18, 19, 20;
Mar. 24.

Scott, Bucknill and Asquith L.JJ.

Local government—District auditor—Power to surcharge—Persons surchargeable—Limitation to member officer or servant of local authority—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 228, *sub-s.* 1 (*d*).

The power conferred on the district auditor by s. 228, sub-s. 1 (*d*) of the Local Government Act, 1933, " to surcharge the amount of " any loss or deficiency upon any person by whose negligence or " misconduct the loss or deficiency has been incurred " is not exercisable in the case of any person who is not a member, officer or servant of the local authority whose accounts are being audited.

Appeal from Divisional Court (1).

At all material times the respondent, V. R. Dickson, was the managing director of a private limited company, Hortensia Garages, Ld., in which he owned all the shares but one. By a contract made in September, 1939, between the London County Council and the company which continued in force till September 29, 1943, Hortensia Garages, Ld., undertook to carry out repairs to certain vehicles belonging to the London County Council which had been damaged in air-raids. By the terms of the contract, which was on a cost-plus percentage basis, the remuneration of the company was to be ascertained by adding a percentage (at first of 147 per cent. and later of 157 per cent.) to the company's wages bill, incurred in respect of the repairs carried out, the London County Council supplying the necessary materials. After the contract had been in force for more than three years it was discovered that some of the accounts sent in by the company were wrong in that the time alleged to have been spent by the company in carrying out the work undertaken had been exaggerated. The respondent was prosecuted for obtaining sums amounting to 103*l.* 3*s.* 1*d.* by fraud and was convicted. The appellant, who was the district auditor, conducted a series of audits of the accounts of the London County Council under the powers conferred on him by the Local Government Act, 1933, in the course of which he had before him all the transactions relating to the contract between the London County Council and Hortensia Garages, Ld. falling within the three years ending March 31, 1944. As

(1) [1947] K. B. 879.

the result of the audits he came to the conclusion that owing to the misconduct of the respondent the wages bill of Hortensia Garages, Ld. had during the period covered by the contract, been fraudulently inflated to such an extent that the London County Council had been induced to pay the company at least 20,000*l.* more than was due to it and he accordingly surcharged the respondent with that amount under s. 228, sub-s. 1 (*d*), of the Local Government Act, 1933 (1). Pursuant to the provisions of s. 229, sub-s. 1, of the Act, the respondent appealed to the Divisional Court against the surcharge. The Divisional Court allowed the appeal (2), holding that under the provisions of s. 228, sub-s. 1 (*d*), the district auditor had no power to surcharge anyone who was not a member, officer or servant of the authority whose accounts were being audited. The district auditor appealed.

Pritt K.C. and *Harold Williams K.C.* for the appellant. The decision of the Divisional Court was wrong since they placed too narrow a construction on the words of s. 228 of the Local Government Act, 1933. It is the duty of the district auditor under that section to "surcharge the amount of any loss or "deficiency upon any person by whose negligence or mis-"conduct the loss or deficiency has been incurred," and to confine their operation to members, officers or servants of the local authority is not to give them their real meaning. The words of the section are substantially the same as those of s. 247, sub-s. 7, of the Public Health Act, 1875, except that the phrase there is "any person accounting" instead of "any

---

(1) Local Government Act, 1933 s. 228, sub-s. 1: "It shall be the "duty of the district auditor at "every audit held by him—(*a*) to "disallow every item of account "which is contrary to law; (*b*) to "surcharge the amount of any "expenditure disallowed upon the "person responsible for incurring "or authorizing the expenditure; "(*c*) to surcharge any sum which "has not been duly brought into "account upon the person by "whom that sum ought to have "been brought into account; "(*d*) to surcharge the amount of "any loss or deficiency upon any "person by whose negligence or "misconduct the loss or deficiency "has been incurred; (*e*) to certify "the amount due from any person "upon whom he has made a sur-"charge; (*f*) to certify at the "conclusion of the audit his "allowance of the accounts, sub-"ject to any disallowances or sur-"charges which he may have "made."

Section 229, sub-s. 1: "Any "person . . . . aggrieved by a . . . . "surcharge made by a district "auditor may . . . . appeal to the "High Court."

(2) [1947] K. B. 879.

"person" as in s. 228, sub-s. 1 (*d*). The section in the Public Health Act was considered by the Court of Appeal in *Rex* v. *Roberts* (1). In that case Fletcher-Moulton L.J. in a dissenting judgment was of opinion that the only person bringing accounts into audit was the local authority itself, while the majority of the court held that "persons accounting" only included "members, officers and servants" of the local authority. It is submitted that as Parliament when passing the Local Government Act, 1933, did not leave the words of the earlier Act untouched, but deliberately left out the word "accounting" after "person" it is clear that they did not accept the majority view in *Rex* v. *Roberts* (1) and that they intended to give to the word "person" a more extended meaning than had been placed on "person accounting" in the earlier Act. The words "a "person by whose negligence or misconduct the loss or "deficiency has been incurred," mean a person who owes a duty of diligence and good conduct and who neglects that duty so as to cause loss or deficiency to the local authority in respect of something for which that person has to account. It is not contended that the word "person" in the sub-section covers all the world, it still only applies to a person who is bound to account to the local authority, and who, if he accounts falsely, will cause loss to the local authority. If that be the true position, it is clear that the respondent was properly surcharged in the present instance. The Act gives the auditor power, not merely to investigate and report, but to "surcharge" and the use of the word "surcharge" connotes a power to enforce any surcharge which he may make. If the decision of the Divisional Court was right a servant of the council who had conspired with Dickson to falsify the accounts could be surcharged by the district auditor, although Dickson himself could not.

[They also referred to *Roberts* v. *Hopwood* (2), *Rex* v. *Hurle-Hobbs. Ex p. Simmons* (3), *Davies* v. *Cowperthwaite* (4).]

Scott Henderson K.C. and *H. G. Garland* for the respondent. The decision of the Divisional Court was right. In construing a section such as s. 228, sub-s. 1 (*d*), of the Local Government Act, 1933, two canons of construction must be observed; (1.) in construing words which, taken literally, have a general meaning, regard must be paid not only to the context of the statute in which they appear but also to the general policy of

---

(1) [1908] 1 K. B. 407.
(2) [1925] A. C. 578.
(3) (1944) 61 T. L. R. 135.
(4) [1938] 2 All E. R. 685.

C. A.
1948
Re DICKSON. *Re* LOCAL GOVERNMENT ACT, 1933.

the law, and (2.) if there are two possible constructions the court will adopt that which does not lead to injustice or absurdity. In the present case there is no injustice or absurdity in restricting the application of s. 228, sub-s. 1 (*d*) to the members, officers and servants of the London County Council, because their actions and the effect of those actions on the council's funds, can be ascertained from the documents which are made public at the audit. The interpretation placed by the appellant on the section is uncertain and leads to injustice. It is uncertain because it is not based on anything like contractual relations or breach of duty and it leads to injustice because the district auditor has no proper machinery for ascertaining the facts. The facts in relation to a person in the respondent's position might not appear in the public documents, and the auditor's power to obtain other documents is limited, and he has no power to summon people to give evidence before him except the very limited power given to him under s. 225 of the Act. With regard to s. 228 of the Local Government Act, 1933, the members and servants of a local authority may cause both a " loss and a deficiency," while outsiders, though they may cause a loss cannot cause a deficiency. The word " misconduct " used in the section is apt to describe the failure of a member of a local authority to act properly and so cause a loss, e.g., as in *Davies* v. *Cowperthwaite* (1), but such misconduct does not give a right of action by the local authority. Misconduct, however, is not an apt word to describe the acts of some outside person. The word " negligence " in the section correctly describes the failure of an officer of the authority to act properly and so cause loss, and it is convenient that there should be a summary method of recovering that loss from the officer by a surcharge, but neither "misconduct" nor "negligence " is an apt word to describe the actions of people who are outsiders and who may be proceeded against by the authority for damages for breach of contract or for tort. *Rex* v. *Roberts* (2) and *Roberts* v. *Hopwood* (3) are authorities in the respondent's favour.

Pritt K.C. in reply.

Cur. adv. vult.

Mar. 24. The following judgment of the court was read by ASQUITH L.J. This is an appeal by the district auditor of the

---

(1) [1938] 2 All E. R. 685.
(2) [1908] 1 K. B. 407.
(3) [1925] A. C. 578.

London District against a judgment of the Divisional Court whereby that court quashed a surcharge made by the appellant on a Mr. V. R. Dickson under s. 228 of the Local Government Act, 1933.

That Act provides by s. 219, as follows: "The following "accounts shall be subject to audit by a district auditor under "this Part of this Act, that is to say—(*a*) the accounts of every "county council . . . ." Section 220, sub-s. 1 reads: "The Minister" (of Health) "may, with the consent of the "Treasury, appoint such number of district auditors as he "thinks necessary for the performance of the duty of auditing "the accounts which are for the time being by law subject to "audit by district auditors . . . ." The appellant was appointed, and acted in respect of the accounts of the London County Council under these provisions. Section 223 provides that "all accounts which are subject to audit by a district "auditor shall be made up yearly to March 31, or to such other "date as the Minister may . . . . direct, and shall be audited "as soon as may be thereafter." Then follow detailed provisions as to the procedure for audit.

[The judgment briefly stated the facts and continued:]

Dickson was in fact prosecuted and convicted at the Central Criminal Court in respect of some of the transactions the subject-matter of the surcharge. This would not in our view amount to res judicata in respect of any issue in the present proceedings much less in respect of the only issue on which we propose to decide this appeal. For the purposes of that issue the question of his guilt or innocence is irrelevant.

The sole ground on which the Divisional Court proceeded in quashing the surcharge was the construction which that court placed on the relevant provisions, and especially on s. 228, of the Local Government Act, 1933. If its decision on this point is well founded, no other question arises and the appeal fails. If that decision is wrong, other complex questions arise. We therefore deal first with this point of construction. [His Lordship read ss. 228 and 229 and continued:]

The district auditor in surcharging Dickson was acting on his interpretation of the opening words of s. 228, sub-s. 1 and of sub-para. (*d*), and the point of construction, shortly, is whether the power to surcharge conferred by sub-s. 1 (*d*) of s. 228 can be exercised in relation to the "negligence or misconduct" exclusively of servants, officers and members (hereinafter called for short collectively "members") of the local authority the accounts of which the district auditor is auditing, or whether on the other hand it can be exercised also in relation to the negligence or misconduct of a class of persons wider than this, and wide enough to include Dickson. Dickson was, it should be noted, not merely not a member of the London County Council: he was not even a person in contractual relations with that council. He was managing director of, and majority shareholder in, a limited company which was in contractual relations with the London County Council. That was the full extent of his legal "proximity" to the council.

There are curiously few cases decided on the meaning of s. 228 of the Local Government Act, 1933, and those few shed little or no light on the point of construction involved in this appeal. Section 228, sub-s. 1 was superimposed on a very similar provision, namely, s. 247, sub-s. 7, of the Public Health Act, 1875: and upon the construction of that section there are at least two important authorities. As the decision of the Divisional Court now under review proceeded in part on a comparison of these two provisions and upon a consideration of the cases decided on the earlier one, it will be convenient first to set out the terms of that earlier sub-section so far as material. Section 247, sub-s. 7 reads as follows: "Any auditor acting in "pursuance of this section shall disallow every item of account "contrary to law, and surcharge the same on the person making "or authorizing the making of the illegal payment, and shall "charge against any person accounting the amount of any "deficiency or loss incurred by the negligence or misconduct "of that person, or of any sum which ought to have been "but is not brought into account by that person, and shall in "every such case certify the amount due from such person, and "on application by any party aggrieved shall state in writing "the reasons for his decision in respect of such disallowance or "surcharge, and also of any allowance which he may have "made."

The cases decided under this sub-section were two. The first was *Rex* v. *Roberts* (1) in which the Court of Appeal decided by a majority that "persons accounting" within the material provision extended to, but (as we read the decision) not beyond, members of the local authority whose accounts were being audited by the district auditor. Fletcher-Moulton L.J., who delivered a dissenting judgment, was of opinion that persons "accounting" did not extend so far, but covered only

(1) [1908] 1 K. B. 407.

the "person" "bringing accounts into audit," namely, in that case the local authority itself.

In *Roberts* v. *Hopwood* (1) the House of Lords had occasion to consider a similar question under a different limb of the same sub-section, and Lord Sumner expressed the view (in what we suppose must be taken as a dictum) that Fletcher Moulton L.J.'s minority view was wrong. At all events this decision of the House of Lords cannot be treated as questioning in any way the decision of the majority in *Rex* v. *Roberts* (2).

These were the only material decisions under s. 247, sub-s. 7 of the Public Health Act, 1875.

We proceed to compare the language of the material part of that section with that of the corresponding part of the section of the Act of 1933, which we have already quoted in extenso.

It will be noted that in the main s. 228, sub-s. 1 of the Act of 1933 is a mere re-arrangement of s. 247, sub-s. 7 of the Act of 1875, the provision contained in the latter in a single sentence being split up into distinct and separately lettered sub-paragraphs, and the topics dealt with in a slightly different order. The words in the earlier provision corresponding to those which have to be construed in the present case are "Any auditor acting in pursuance of this section "shall . . . . *charge* against *any person accounting* the amount "of any deficiency or loss incurred by the negligence or "misconduct of that person . . . . "

The parallel provision in the Act of 1933, s. 228, sub-s. 1 reads as follows: "It shall be the duty of the district auditor " . . . . (*d*) To *surcharge* the amount of any loss or deficiency "upon *any person* by whose negligence or misconduct the loss "or deficiency has been incurred."

It will be observed that in this provision (1.) "charge" in the earlier Act becomes "surcharge" in the later, and (2.) "any person accounting" becomes simply "any person."

It was argued for the appellant—the district auditor—both here and in the Divisional Court, that the omission of the word "accounting" was intended to extend liability under this head from members of the local authority to whom it had been held to apply in *Rex* v. *Roberts* (2) to a wider class which would include persons in the position of Dickson. What other point, it was asked, could there be in omitting what is, on the face of it, a qualifying or limiting epithet than to broaden the class involved? The Divisional Court dealt with this argument in this way (1).

---

(1) [1925] A. C. 578, 601.

(2) [1908] 1 K. B. 407.

"In our view, in all probability the word 'accounting' "was omitted from the Act of 1933 to negative the strict interpretation put on the words by Fletcher-Moulton L.J. and to "make it clear that the interpretation of the Master of the "Rolls and Farwell L.J. was intended by Parliament. It is "unthinkable that Parliament intended by the omission of a "single word to make so startling and drastic a change in the "law . . . ." as to extend liability to persons completely dehors the personnel of the local authority.

The Divisional Court, for this reason principally, held that the class of persons affected was not enlarged by the Act of 1933 beyond the class of "members" and that as Dickson fell outside that class, there was no power to surcharge him. With this conclusion we agree. It is indeed "unthinkable," to quote the language of the Divisional Court, that the draftsman of this section had not in mind the wording of the corresponding section of the Public Health Act, the case of *Rex* v. *Roberts* (1) decided under it, and the different constructions placed on that provision by the majority and minority of the Court of Appeal. A narrow construction had been placed by the minority on the class of persons affected and the presence of the word "accounting" had been relied on in support of the minority view. Hence that word which had proved ambiguous was dropped. The following further considerations appear to us to support the Divisional Court's conclusion—(1.) The change from "charge" to "surcharge." "Surcharge" is a curiously inappropriate expression—more inappropriate than "charge" —for an operation whereby someone, a stranger to the council whose accounts are being audited, is to be compelled to make good the loss which the council has suffered owing to that stranger's negligence or misconduct. The typical (though not the only) use of the term "surcharge," which is not defined in the Act, is that given in the Oxford English Dictionary under meaning 1 (*c*): "A charge made by an auditor on a public "official in respect of an amount improperly paid by him": a very different thing from a charge or levy made on a member of the outside public who is the wrongful recipient or causative agent of such a payment. True, sub-s. 1 (*d*) must be assumed to add something to the meaning we have suggested as typical, and which finds expression in sub-s. 1 (*a*)–(*b*). What sub-s. 1 (*d*), in our view, adds is this: it extends the class of transactions which may attract a surcharge, not the class of persons subject to the district auditor's surcharging jurisdiction. Its effect is simply that members of the council may not only be compelled to refund (as under sub-paras. (*a*) and (*b*)), payments made by them and disallowed as "contrary to law," but may also be compelled to make good loss, etc., suffered by the council owing to their negligence or misconduct as such members, a good instance of which is afforded by one of the very few cases decided since and under the 1933 provision—*Davies* v. *Cowperthwaite* (1). In that case councillors were surcharged with the amount of legal costs incurred by the council as a consequence of the councillors in question acting in opposition to legal advice tendered to them by the clerk to the council, the soundness of which, as legal advice, they did not doubt or challenge. This was adjudged "misconduct" within sub-s. 1 (*d*).

---

(1) [1947] K. B. 885.

(2.) "Any person" cannot on any view be read literally and without limitation. Loss would be caused to the council if a lorry belonging to it were damaged by being negligently driven into by X., a stranger. No one would suggest, and certainly counsel for the appellants disclaimed the suggestion in this court and below, that the auditor could in that event "surcharge" X in respect of the loss, although that loss might be reflected in the council's accounts. Nor is it suggested that the auditor could "surcharge" any outside person contracting with the council whose breach of contract, without more, caused the council loss. (In both of these cases incidentally the council would have a perfectly good remedy at common law for damages, without any intervention by the district auditor.) Unless, therefore, "any person" is impliedly limited to persons who are members of the council (in which expression, we repeat, we include its officers and servants) what limit is to be placed on the expression?

To this question we do not think counsel for the appellant propounded any satisfying answer. In the court below it was argued that "any person" meant any person who stands "in a "relation to the local authority which calls upon him for diligence and good conduct on some special ground other than "the general duty resting on all members of the community": and in this court, that the person must stand to the local authority in a relation out of which the law will spell some special obligation of honesty or disclosure.

---

(1) [1938] 2 All E. R. 685.

To read into the sub-paragraph a qualification at once so vague and so complex, would in our view be to re-write it. But even as so re-written, would it apply to Dickson ? It was conceded that the suggested formula would not cover any and all persons having a contract with a local authority. The contention was that it would cover persons having with the local authority a " cost plus percentage " contract involving a contractual duty to state accurately the " cost " incurred. Even if this were so, the fact remains that Dickson was not in contractual relations with the council at all. He was indeed bound, in tort, not fraudulently to misrepresent the quantum of the cost, or to procure his company, or conspire with it, to make such a fraudulent misrepresentation, or to induce a breach of contract by the company which such a misrepresentation might involve. But these are torts, and the obligation not to commit torts is a general duty resting on all members of the " community " within the appellant's formula, which excludes from the expression " any person," and, therefore, from liability to surcharge, a person on whom such a " general " duty " and no more, reposes. Moreover (though this is not conclusive) for all such acts the common law provides the local authority, as against such a person, with an adequate cause of action in tort for deceit, conspiracy, or procurement of breach of contract as the case may be, without recourse to the machinery of s. 228. Some attempt was made to argue that a merely moral duty owed by an outsider might bring him within the operation of the sub-section ; or that Dickson must be treated as the alter ego of the company and identified with it ; but we found both of these arguments unconvincing.

We would add that neither of the two cases decided under the existing provision—*Davies* v. *Cowperthwaite* (1) and a case (unreported) referred to in the argument as " the Finsbury " case," shed any light, direct or indirect, on the only issue we are considering, namely, that of the liability to surcharge of non-members of the local authority.

We therefore feel bound to dismiss the appeal on the " point " of construction," which concludes the matter against the appellant : and we find it unnecessary to decide questions argued at some length before us, questions of great interest as to what, if Dickson had been subject to the surcharge jurisdiction, was the prescribed procedure for the inquiry held by the district auditor : whether that procedure impliedly

(1) [1938] 2 All E. R. 685.

included certain requirements of "natural justice"; and whether, with or without such added requirements, it was in fact complied with in this case.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Sharpe, Pritchard & Co.*
Solicitors for the respondents: *Alfred C. Warwick & Co.*

P. B. D.

SMART *v.* SPENCER.

C. A.
1948
Mar. 10, 11, 23.

Tucker, Somervell and Cohen L.JJ.

Master and servant—Agricultural worker—Minimum wage—Contract providing for no pay during illness—Absence for period of complete weeks—Claim for arrears of wages—Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5, *c.* 37), *s.* 2, *sub-s.* 1; *s.* 7, *sub-ss.* 1, 10 (1).

The Agricultural Wages (Regulation) Act, 1924, prescribes the minimum wage to be paid to an agricultural worker for work done in a period in which he works. It has no application to a period during which a worker does not work and is not required by his employer to work. Accordingly, while, in the case of a worker employed by the week, the Act prescribes the minimum wage to be paid to him for a week in which he works, it does not apply in respect of a period of weeks during which the worker is, under his contract of employment, not required to work.

---

(1) By the Agricultural Wages (Regulation) Act, 1924, s. 2, sub-s. 1: "Subject to the "provisions of this Act, agricul- "tural wages committees shall fix "minimum rates of wages for "workers employed in agriculture "for time work, and may also, "if and so far as they think it "necessary or expedient, fix mini- "mum rates of wages for workers "employed in agriculture for "piece work."

By s. 7: "1. Where any "minimum rate of wages has been "made effective by an order of "the Agricultural Wages Board "under this Act, any person who "employs a worker in agriculture "shall, in cases to which the mini- "mum rate is applicable, pay "wages to the worker at a rate not "less than the minimum rate, and, "if he fails to do so, shall be liable "on summary conviction in "respect of each offence to a fine "not exceeding twenty pounds "and to a fine not exceeding one "pound for each day on which the "offence is continued after con- "viction .... 10. Any agreement "for the payment of wages in "contravention of this Act, or for "abstaining to exercise any right "of enforcing the payment of "wages in accordance with this "Act, shall be void."

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

An agricultural worker paid by the week was absent from work for several months through illness. His employer did not give him notice but, in accordance with the contract of employment, paid him no wages during his absence, although he allowed him to continue to occupy his cottage rent free throughout. At the end of the period the employer gave him a week's notice, whereupon he claimed under the Act of 1924 arrears of wages for the period during which he had not worked.

Held, that the wages claimed were not recoverable under the Act, since the contract, in providing for non-payment of wages during absence through illness, neither contravened s. 7, sub-s. 1, nor was void under s. 7, sub-s. 10.

Held, further, that the fact that under the Act of 1924 the benefit of being allowed to occupy a cottage rent free must be treated as wages of the worker to the extent of 3*s*. a week did not mean that the worker, because allowed to remain in the employer's cottage rent free during his illness, was being paid 3*s*. a week wages during that time.

Semble: if a contract providing for no pay during absence through illness operated in respect of odd days in a week, with the result that the worker received less than the minimum wage for a week in which he had worked, the contract would be void under s. 7, sub-s. 10.

Seabrook & Sons Ld. v. *Jones* [1929] 1 K. B. 335 distinguished.

APPEAL from Kettering county court.

The plaintiff, William Henry Smart, was an agricultural worker employed by the defendant, Percy Reginald Spencer, a farmer. From October 22, 1945, to June 20, 1946, the worker was absent from work owing to illness. He suffered from a serious disease of the liver and never returned to work. The farmer did not terminate his employment until June 20, 1946, when he gave him a week's notice. The county court judge found that it was a term of the contract of employment, by custom or necessary implication, that the worker should not be paid during absence from work through illness, and he held that such a term was rendered void by s. 7, sub-s. 10, of the Act of 1924. He therefore gave judgment for the plaintiff worker for 153*l*. 18*s*. 3*d*. arrears of wages at 4*l*. 6*s*. a week. The defendant farmer appealed.

Garth Moore for the farmer. Supposing that the Agricultural Wages (Regulation) Act, 1924, applies, and renders it impermissible for no wages to be paid while the contract of employment is in being, then the proper construction of this particular contract in relation to the Act is that it terminated with the beginning of the worker's illness, and that the worker could, when fit again, apply to be re-employed. The Act does not, however, it is submitted, apply to a case of this kind. It was an implied term of the contract, and the county court judge has so found, that the worker should not be paid while absent through illness. All that the parties probably had in mind when they entered into the contract of employment can be summed up in the phrase "no work, no pay." That can be rendered in more than one way in legal phraseology. For instance, it might be said that the employment continued during the illness, but was gratuitous. In a case of this kind it is probably nearer to the intention of the parties to say that the contract terminates on sickness, but that, in the absence of notice given by either side, it begins again when the sickness is over. The parties' silence or language should in a case of this kind be treated by the court in a way which gives effect to what is known to have been their intention which they were unable to express properly. It was the undoubted intention of the parties that when the worker did not work he should receive no pay, and they were entitled to make that arrangement apart from the Act. The Act lays down that a man in work shall not be paid less than a certain amount. It does not lay down that a contract shall go on for ever, or that a man who is not working shall receive pay. [*O'Grady* v. *M. Saper, Ld.* (1) referred to.] *Seabrook & Sons, Ld.* v. *Jones* (2), on which the county court judge based his decision, shows that the word "employment" does not only mean actually being engaged in work, and that since "employment" also means currency of the employment, it is impermissible to pay less than the minimum wage during employment merely because at some time the worker was not physically engaged in working. Wages can be regarded as a return for work done. The Act is directed to ensuring that the return for work done shall not be below a prescribed minimum. It is not concerned with the larger contract, or with the question whether any wages are due at all. It is concerned with periods during which workers are ready and able to work, not with a case like the present, for it is not designed to provide a kind of pension.

Diplock for the respondent worker. The word "wages" is not defined in the Act of 1924. It bears in the Act its ordinary meaning of remuneration payable to a worker by an employer under a contract of service irrespective of whether the worker actually works or for some reason or other does not work. [*Cuckson* v. *Stones* (1), *Marrison* v. *Bell* (2), and s. 25 of the Truck Act, 1831, referred to.] The true effect of s. 7 of the Act of 1924 is that in all contracts of employment of a worker in agriculture, where the wages fixed by the contract are below the minimum rate prescribed by the Agricultural Wages Board, there must be substituted in the contract the wages so prescribed for the wages as provided for: see the judgment of Romer L.J. in *Gutsell* v. *Reeve* (3).

---

(1) [1940] 2 K. B. 469. (2) [1929] 1 K. B. 335.

[SOMERVELL L.J. Does that not negative your contention here, namely, that where nothing is payable under a contract, as, for example, during sickness, the Act makes wages payable ?]

The case for the worker can be put more widely than Romer L.J.'s proposition: as soon as a contract of employment is in force, the wages must be paid which the Act prescribes. In *Gutsell* v. *Reeve* (3) the effect of the proposition was to increase the wages being paid to the worker. Here its effect is to make payable what was not paid to the worker at all. [Judgment of Lord Wright M.R. (4) referred to.]

[SOMERVELL L.J. But the rate of wages payable while this man was ill was nil. There was no rate at all.]

It is clear that if a contract of employment provided that for every week in four weeks the worker should work for nothing he would be able to sue for his wages on the basis that he had been paid only three weeks' wages for four weeks' work, in other words, only three-quarters of his wages. The result of the employer's argument here would be that the worker could not sue for his wages for the fourth week.

A term in a contract of employment that money wages shall not be paid during a worker's illness is, in cases where a minimum wage has been fixed, an agreement for payment of wages in contravention of the Act and at a rate less than the minimum prescribed. That term must accordingly be replaced by the implied statutory term that the minimum wage shall be paid during illness.

[SOMERVELL L.J. This Act of 1924 does not do what the Holidays with Pay Act, 1938, did. It would require clear words to produce that result. If this argument is right, any farmer is guilty of a criminal offence who offers a worker a week's holiday with no pay. Should not any ambiguity in

(1) (1859) 1 E. & E. 248.
(2) [1939] 2 K. B. 187.
(3) [1936] 1 K. B. 272, 289.
(4) Ibid. 282.

the Act be resolved against the creation of a new offence ?]

For the Act to prescribe the term referred to with regard to wages during illness is no greater an infringement of the liberty of contract than the prescribing of a minimum wage.

[SOMERVELL L.J. Not greater, perhaps ; but different in kind.]

This is a continuing contract. A fresh contract is not entered into at the beginning of each week. Looked at as a continuing contract, it is one to pay wages at less than the minimum rate. If there were a separate contract each week, there would be a contract not to pay wages during a week of absence ; but in this continuing contract there is only one term concerning wages, namely, that the employer will pay *xl.* a week except when the worker is absent through illness.

[SOMERVELL L.J. Do you say that any farmer who, keeping a worker in his employment, retaining his insurance card, etc., gives him a holiday without pay, is committing a criminal offence ?]

Yes, subject to the regulations. That follows from *Seabrook & Sons, Ld.* v. *Jones* (1), and the same applies to illness.

[TUCKER L.J. It may be that wages in relation to agriculture means wages paid for work done, and that those who drafted the Act of 1924 must be assumed to have been aware of the custom not to pay wages during absence through illness.]

[Counsel referred to *Petrie* v. *Mac Fisheries, Ld.* (2) and the judgment of Atkinson J. (3), and to *Niblett* v. *Midland Ry. Co.* (4).] If this is a continuous contract, then a provision in it that during certain periods wages are not payable is contrary to s. 7, sub-s. 1, of the Act of 1924. In any event wages may be said to have been paid to the worker throughout his illness to the extent of 3*s.* a week, for he was allowed to remain in occupation of his cottage rent free, and the Act ascribes to occupation of a cottage 3*s.*, which is deductible from the wages.

Garth Moore in reply. Little light is really shed on this case by close examination of any other case, or by considering what the words " wages " and " employment " mean in other contexts. " Employment " is specially defined in s. 16 of the Act of 1924. The employer does not rely on establishing a general custom with regard to wages during illness, but that does not mean that a custom relating to that matter can be ignored. The

(1) [1929] 1 K. B. 335.
(2) [1940] 1 K. B. 258, 266.
(3) Ibid. 269.
(4) (1907) 23 T. L. R. 240.

C. A.
1948
SMART v. SPENCER.

observations of Phillimore J. in *Niblett* v. *Midland Ry. Co.* (1) and of du Parcq L.J. (2) and Atkinson J. (3) in *Petrie* v. *MacFisheries, Ld.* (2), are reflections of what is generally known. The custom may be borne in mind in considering the interpretation of this Act of 1924, which is concerned with agricultural matters. "Wages" in the Act surely means payment for work done. The whole tenor of the Act is the prescribing of wages to be paid to workers in agriculture. Again and again throughout the Act expressions like "workers "in agriculture" appear. Surely it is a straining of language to regard a man lying in his bed as coming within the provisions relating to workers in agriculture. Section 7, sub-s. 10, refers to a certain kind of agreement as being void under the Act; but it does not refer to an agreement for the paying of no wages.

[TUCKER L.J. Is there any distinction between an agreement to pay no wages and an agreement to pay something less than the minimum wage in respect of a period when no work is done?]

There is nothing for the Act to operate on in an agreement to pay no wages in a period when no work is done. There is a contract of employment while a man is working; but while this worker was away ill there remained in being only a contract *for* employment, and that was not a contract within the Act. There is a valid contract here to the effect: "no work, no pay," and it could be framed in such a way as to give effect to the intention of the parties without infringing the Act. The result of the argument for the worker here, were it to prevail, would be that every worker falling ill must be dismissed from his employment. [*Gutsell* v. *Reeve* (4) referred to on the meaning of "wages."]

As for the contention that the worker in fact received 3*s*. a week wages during his absence, the fact that the worker's right to occupy his cottage rent free while he works for this employer is under the Act to be treated as wages to the extent of 3*s*. a week does not mean that he was in fact paid 3*s*. a week during his illness. The employer cannot surely be held to have paid some wages on which the Act can operate merely because he continued to allow the worker to occupy the cottage rent free.

The difference between *Seabrook & Sons, Ld.* v. *Jones* (5) and this case is very wide. This Act regulates the wages to be paid to workers in agriculture, and the man said to be a worker in agriculture here was under no contractual obligation at all to work while he lay ill. While in that state, he was neither a worker nor engaged in agriculture.

---

(1) 23 T. L. R. 240.
(2) [1940] 1 K. B. 158, 266.
(3) Ibid. 269.
(4) [1936] 1 K. B. 272, 289.
(5) [1929] 1 K. B. 335.

Cur. adv. vult.

March 23. SOMERVELL L.J. read the following judgment of the court. The main defence was that during that period the plaintiff was away sick, and that either by the contract or by custom he was not entitled to wages. At the conclusion of the evidence, what is in effect an alternative claim was put forward under the Agricultural Wages (Regulation) Act, 1924, on the basis, which we will examine in detail later, that a term of a contract that no wages are payable during sickness is void under that Act.

The county court judge found as a fact that during the period in question the farmer did not terminate the worker's employment. " Employment " may be an ambiguous word, but this finding, which is one of fact, is that the contract between the parties subsisted in accordance with its terms, apart from any effect of the Act upon those terms. The judge then found that it was a term of the contract that no wages should be paid for a period when the workman was away from work, whether from illness or through his own will. He then held, as a matter of law, that the worker was entitled to the wages claimed by reason of the provisions of the Act relied on.

Although we are in our conclusion differing from the judge, we have been much assisted by his judgment on what is a difficult case. The judge based his decision mainly on *Seabrook & Sons, Ld.* v. *Jones* (1). Before examining that case, we will consider the terms of the Act relied on.

The Act provided for the setting up of a committee with statutory powers to fix minimum rates of wages for workers employed in agriculture. [His Lordship read s. 2, sub-s. 1, and s. 7, sub-ss. 1 and 10, and continued :] A subsidiary point arises under the power conferred by s. 8, sub-s. 1 (*a*), which gives power to make regulations requiring the committees to define and value benefits which may be reckoned as payment of wages.

In approaching the problem of construction, it is, we think, important to bear in mind the distinction between two quite different matters in which legislation might impose terms as between employer and employed: the first is the provision of a minimum wage for work done; there is more than one Act on the statute book which sets up machinery for fixing minimum rates of pay in certain industries. There is another and quite different issue, namely, whether a man should receive wages in respect of a period when he does no work and is not required by his employer to work. An example which led to legislation in 1938 is that of holidays. It is common knowledge (otherwise the Act would have been unnecessary) that a man under the terms of his employment might have one or more weeks' holiday without pay, or, perhaps, in some cases, with half or some other proportion of his pay. The contract was not terminated by notice before the holiday and the man re-engaged afterwards: the contractual relationship subsisted, but, according to its terms, no work was required from the man and no wages were due from the employer. Although the man was in one sense not "employed" during that week, in the other sense he remained in the employment of his employer. Another example is where the contract expressly provides that during a defined or indefinite period of inability to work through sickness the man shall receive no pay, or again, possibly, a proportion of his pay.

---

(1) [1929] 1 K. B. 335.

If the legislature were minded to interfere in this area in a minimum-wage Act, one would expect the language to make it clear that this separate subject matter was also being dealt with. Holidays with pay is the simplest example. The fact that the wages or some of the wages paid in a particular industry are thought to be too low would afford no logical basis for singling out that particular industry for imposing a minimum rate to be paid during holidays or sickness where the contract provides otherwise. The judge construed s. 7, sub-ss. 1 and 10 as producing this result, and he regarded the issue as covered by the case to which we have referred.

It seems to us clear that the Act is dealing with what we have called the first matter, namely, the fixing of a minimum wage to be paid for work done; and it would, in our view, have needed clear and express words if its scope was to be extended to the second matter to which we have referred. The long title refers to "the regulation of wages of workers in agriculture."

The wording of s. 2, sub-s. 1 supports this view. One curious result of Mr. Diplock's argument would be that it would, so far as we can see, be legal to provide for no pay during holidays or sickness for a "piece worker," but not for a man employed for time work. The piece worker would have no claim during the periods in question. It would seem absurd to make (say) holidays with pay depend on the method of remuneration. The Act is, in other words, in our opinion, operating on the primary provision of any contract of service of the kind with which it is dealing, namely, what is to be paid for the work which the man contracts to do during the period in question. We are concerned with a man employed by the week, and we construe the Act as setting up machinery to lay down what is the least he is to be paid for a week in which he works. When, therefore, s. 7, sub-s. 10 speaks of an agreement for the payment of wages in contravention of this Act, it is not dealing with weeks in which under his contract the workman is not required to do any work.

In *Seabrook & Sons, Ld.* v. *Jones* (1) the court were dealing with an order of the Agricultural Wages Board in the following terms: "Where a whole-time male worker is employed by "the week or any longer period and the hours of work agreed "between the worker and the employer in any week (excluding "hours of overtime employment) are less than 50 in summer "and 48 in winter, the rate of wages applicable to that worker "shall be such as to secure to the worker the wages which would "have been payable if the agreed hours had been 50 in summer "or 48 in winter as the case may be." This is, of course, plainly designed to deal with weeks in which a man works. It speaks of the "hours of work agreed between the worker "and the employer." The employers had placed up a notice: "Good Friday, April 6 . . . . Employees will not be required "on this day and work cannot be found for them. Pay for "half a day will be given." This was in accordance with custom. The man was paid the minimum less the sum calculated to represent his remuneration for half Friday. It was argued that the provision of the order was ultra vires as compelling employers to pay for time which is not worked. The orders made under the Act have proceeded on the basis of providing a minimum wage for a week of so many hours. These are, of course, the hours during which the man undertakes to work, and that in itself seems to us to show the inapplicability of such orders to a week in which a man does not have to work any hours.

The case was dealing with a week in which the man was working. It seems to us clearly within the Act to lay down that where a man is employed by the week—at that time fifty hours in summer and forty-eight in winter—if in any week the hours as agreed are less, the minimum shall still be paid. Another clause referred to in argument provided, possibly ex abundanti cautela, that the minimum should not be reduced because the weather prevented the full hours from being actually worked. The decision that the provision of the order was intra vires and applied to the facts of the case does not seem to us to affect in any way the conclusion to which we come in this appeal. Lord Hewart C.J. based his conclusion on the definition of employment in s. 16, sub-s. 1: "The expression 'employ-"'ment' means employment under a contract of service or "apprenticeship, and the expression 'employed' and "'employer' shall be construed accordingly." He adds (1): "It"—that is employment—"does not mean actual working "at the moment." With respect, we doubt if the definition clause does more than make it clear that apprenticeship is covered. We think, without any reliance on this definition, that the words "fix minimum rates for workers employed in "agriculture for time work" cover a provision that a minimum for a fifty hour week shall be paid, although "in any week," because of a local holiday or other special circumstances, the employer says to a workman: "I shall not require you this "week for the full 50 hours." Lord Hewart C.J.'s observation must be read in its context, and, no doubt, it must have been argued that, although the man was clearly employed during the week the weekly wage of which was in issue, the Friday must in some way be allowed to reduce the weekly minimum because the man was not actually at work "at that moment." If, which we do not think, Lord Hewart C.J. intended to lay down a general principle covering the issue in the present appeal, we respectfully disagree. It was not necessary to the decision. We would like to express our complete agreement with the actual decision come to and with the reasoning of Avory J.

---

(1) [1929] 1 K. B. 335.

The judge in the present case found that the agreement for no pay applied if the man was sick only for one day in a week in which he worked the remaining days, and therefore under the agreement the minimum would fall to be pro tanto reduced. The actual claim here is for complete weeks in which the man, being sick, could not and was not required to work. If an issue had been raised as to odd days within a week, we think

(1) [1929] 1 K. B. 335, 339.

that if the application of the contract reduced the amount below the minimum it might have been void under s. 7, sub-s. 10 or that a regulation overriding such a provision would have been intra vires. It might have been argued that par.. 2 of the regulations of March 27, 1946, to which we were referred, covered the point. The judge regarded the whole weeks with which we are concerned as on the same basis as odd days in a week in which a man works, and, therefore, regarded this case as covered by *Seabrook & Sons, Ld.* v. *Jones* (1). We have given our reasons for disagreeing with this view.

The argument for the employer was at one time put on the basis that the Act did not apply during a week when no wages were due. An answer was made to this based on the fact that throughout this period the man was allowed to occupy a cottage rent free, and that the benefit of this is, under the Act and the Order, to be treated as wages to the extent of 3*s*. a week. The fact that under the Act such a benefit "may be reckoned "as payment of wages" for the purpose of the minimum would not necessarily make it wages in other contexts. This does not, in any event, affect our reasons for allowing the appeal. In our view, as we have said, a contract that during a limited or indefinite number of weeks of sickness a man should receive (say) half wages when wholly absent from work is not voided by s. 7, sub-s. 10.

If there is doubt about the construction, it is relevant that s. 7, sub-s. 1, makes it a criminal offence to pay wages at a rate less than the minimum rate when such rate is applicable.

For these reasons we think that the appeal should be allowed.

Appeal allowed.

Solicitors for the defendant farmer: *Taylor, Jelf & Co., for Josiah Hincks & Son, Leicester.*

Solicitors for the plaintiff worker: *Boxall & Boxall, for Wilson & Wilson, Kettering.*

---

(1) [1929] 1 K. B. 335.

1948
Apr. 29.

Lord Goddard C.J., Humphreys and Pritchard JJ.

JOHN LAING & SON, LIMITED *v.* ASSESSMENT COMMITTEE FOR KINGSWOOD ASSESSMENT AREA AND OTHERS.

Rating—Proposed amendment of valuation list—Building contractor's offices, canteens, huts, structures, land, etc.—Beneficial occupation—Rateable occupation—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 10.

Building contractors, having entered into a contract to execute works involving the strengthening, widening and lengthening of a runway the preparation of a landing ground and the demolition of buildings, on a government aerodrome, erected on the site, for the purpose of carrying out the contract, offices for the accommodation of their supervisory staff, garages, canteens for workmen, carpenters' shops, huts and concrete foundations for heavy machinery and plant. The local rating authority having made a proposal to amend the current valuation list by adding thereto as a rateable hereditament the contractor's offices and other structures, the contractors objected and appealed to quarter sessions. By agreement between the parties a special case was thereupon stated for the opinion of the Divisional Court on the question whether the contractors were in rateable occupation of all or any of the structures comprised in the said hereditament.

Held, that the appellants were occupying the site as licensees for the purpose of carrying on their business, thereby acquiring a beneficial occupation. They were therefore in rateable occupation of the hereditament and the question submitted to the court must be answered in the affirmative.

Principles laid down in *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* [1936] A. C. 511 applied.

CASE STATED.

By a contract in writing dated June 21, 1946, made between H.M.'s Secretary of State for Air and the appellants John Laing & Son, Ld., the appellants undertook to execute works involving the strengthening, widening and lengthening of the East-West runway, the preparation of the landing grounds and the demolition of buildings at Filton Aerodrome in the county of Gloucester. The contract price was approximately 1,250,000*l.* and the bills of quantities provided for 850,000 yards cube of excavation, 580,000 yards cube of hardcore filling, 180,000 yards cube of concrete paving, 24 separate properties to be demolished, 235 acres of landing grounds to be prepared and 9 miles of storm water drainage to be laid.

On June 26, 1946, a part of the site was handed over by the

Secretary of State to the appellants for the assembly of plant and offices, and the remainder of the site on which constructional work was to be carried out under the contract was handed over in sections as it became available. The contract date for completion of the work was eleven months from June 26, 1946, but circumstances had arisen which entitled the appellants to an extension of time and work was still proceeding. In carrying out the contract the appellants necessarily employed a supervisory staff of seventy-five to one hundred persons and were obliged to provide temporary office accommodation for them. In addition to main office building (contractor's office), which was handed over to the appellants by the Air Department for use during the period of the contract, the appellants erected offices for the technical staff, the clerk of works and the field engineers, a central time office, changing rooms and first aid room, a foreman's office, garages, two weighbridge huts, a workmen's canteen, a carpenters' shop, a transport hut, batching and mixing plants, bases for concrete mixers, loading sheds for concrete mixers, and loading ramps and platforms for concrete mixers.

On February 21, 1947, the Rating Authority for the Thornbury Rural District Council made a proposal to amend the current valuation list of the area by adding thereto as a rateable hereditament the appellants' "offices, canteens, "huts, structures, land, etc.," which were assessed at 484*l.* gross value and 400*l.* rateable value. The appellants objected to the proposal and on March 21, 1947, the assessment committee for the Kingswood Assessment Area considered the proposal and objection and decided to make the proposed amendment to the valuation list. The appellants duly gave notice of appeal to the county of Gloucester Quarter Sessions, and on March 5, 1948, Birkett J., with the consent of the parties, ordered a special case to be stated between the appellants and the respondents.

The question of law submitted for the opinion of the court was: "Whether or not the appellants are in rateable occupa-"tion of all or any of the structures comprised in the said "hereditament."

Scott Henderson K.C. and *R. D. Stewart-Brown* for appellants. This case is brought in order that the position with regard to rating of building contractors who are in possession of a building site may be made clear. It has always been accepted that

1948

JOHN LAING & SON LD. v. ASSESSMENT COMMITTEE FOR KINGSWOOD ASSESSMENT AREA.

houses under construction are not rateable, there being no beneficial occupation. There is, however, great uncertainty whether building contractors should be rated in respect of any part of the building site on which they are carrying on work. It is really immaterial to the contractors themselves, because they can add the rate, if payable, to the cost of construction. No point is made in the present case that the building owner is the Crown. It is submitted that (1.) an owner cannot be in rateable occupation of land of which he has possession as a building site only. (2.) A contractor who takes possession of a building site in the way in which the appellants have taken possession in this case is no more in rateable occupation than the building owner. (3.) The building contractor is no more in occupation of the structures which it is proposed to rate than he is of the other land comprising the building site. The fact that the modern contractor instead of preparing his material by hand on the site now brings machinery and plant on to the site makes no difference in principle but only in degree. He is no more rateable than was the user of the old shanty which sheltered workmen on the site. Section 37, sub-s. 10 of the Rating and Valuation Act, 1925 (1) contains a clear recognition of the principle that a new or reconstructed building only becomes rateable when it comes into occupation. Rateable occupation is beneficial occupation and no contractor who comes on to land only to carry out a building contract is in beneficial occupation.

Rex v. *Attwood* (2); *Smith & Son* v. *Lambeth Assessment Committee* (3); *Tyne Coal Co.* v. *Overseers of Wallsend Parish* (4); *Cleveland Bridge & Engineering Co.* v. *Darlington Union Assessment Committee* (5); *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (6); and

---

(1) Rating and Valuation Act, 1925, s. 37, sub-s. 10: . . . "Provided that, in the case of an "amendment consisting of the "inclusion in the valuation list "either of a newly-erected, or "newly-constructed hereditament "or an altered hereditament which "has been out of occupation on "account of structural alterations, "or of the alteration in the valu- "ation list of the value of any "hereditament, where the value "thereof has been affected by the "making of the structural alter- "ations . . . the amendment "shall have effect only as from the "date when the new or altered "hereditament comes into "occupation, or as from the "happening of the event giving "rise to the alteration of the "value of the hereditament, as "the case may be . . . ."

(2) (1827) 6 B. & C. 277.

(3) (1882) 10 Q. B. D. 327.

(4) (1877) 46 L. J. (M. C.), 185.

(5) (1923) 21 L. G. R. 511.

(6) [1936] A. C, 511.

Liverpool Corporation v. *Chorley Union Assessment Committee* (1) referred to.

Rowe K.C. and *Squibb* for respondents. The present case contains all the essential elements of rateable occupation. There is (1.) an actual possession; (2.) the possession is exclusively for the particular purposes of the person in possession; (3.) the possession is of use or value or benefit to the possessor; (4.) and the possession is not of too transient a nature. *Cleveland Bridge & Engineering Co.* v. *Darlington Assessment Committee* (2), on which the appellants largely rely is no longer a good authority. The ratio decidendi of that decision is quite untenable since the decision in *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (3). *Tyne Coal Co.* v. *Overseers of Wallsend Parish* (4) is distinguishable, and in some respects is bad law. The judgment of Grove J. is based on certain misconceptions, since dispelled. Rateability depends not on title, but fact. The contractors have just as much exclusive use of these buildings and land as if they were situate in their own back yard or some land outside the aerodrome, and it is clear that they derived direct benefit from the use.

Scott Henderson K.C. in reply. *Cleveland Bridge & Engineering Co.* v. *Darlington Assessment Committee* (2) is right in principle though some of the reasoning for the decision has been shown to be inaccurate.

LORD GODDARD C.J. This is a special case stated under s. 11 of Baines' Act, and it raises an interesting question which has been, in some respects, the subject of other decisions, but has never come before the court, I think, in exactly the same neat way that this case does.

The question that has to be determined is whether contractors who are working upon a site for the construction of large public works, in this case an aerodrome—the exact nature of the construction does not matter—are liable to be rated, not, of course, in respect of the aerodrome, but in respect of buildings and other erections which they had themselves erected for the purpose of the work which they had to carry out.

It is unnecessary, I think, for me to read, in giving judgment, the terms of the special case, but in substance the position is

(1) [1913] A. C. 197.

(2) 21 L. G. R. 511.

(3) [1936] A. C. 511.

(4) (1877) 46 L. J. (M. C.) 185.

this: the appellants, Messrs. John Laing & Son, Ld., who are large public works contractors, have undertaken a contract with the Secretary of State for Air for the construction of runways and various other matters, which it is unnecessary to detail, at the Filton aerodrome. The provisions of the contract require the contractors to do certain things which necessitate the putting up of buildings. Whether they are huts or whether they are made of breeze or whether they are made of brick, seems to me to be immaterial. No one suggests that these buildings are likely to be permanent buildings, in the sense that they will remain on after the work of construction has been done. In fact, the contract provides that at the end of the work of construction these buildings and other erections, some of which are really foundations for the purpose of mounting the very heavy machinery which is necessary for this place, are to be taken away and, indeed, the supervising officer, who is in the service of the Crown, can order them to be taken away at any minute.

Mr. Scott Henderson has told us that this case is brought to test whether contractors who undertake this class of work are rateable in respect of the land occupied by their buildings and erections, and that no point is to be taken in this case—and no point is taken—as to the work being done on the Crown land or for the Crown, or as to whether the hereditament is an industrial hereditament or not; nor are we concerned with regard to any question of values or figures. Mr. Henderson's argument has been based largely on the fact that under s. 37, sub-s. 10, of the Rating and Valuation Act, 1925, it is provided that an amendment made in the valuation list in pursuance of this section shall, in relation to any rate current at the date when the proposal in pursuance of which the amendment was made was served on the rating authority, or, where notice of the proposal was given to the occupier or owner, as the case may be, of the hereditament affected, current at the date when the notice was so given, be deemed to have had effect as from the commencement of the period in respect of which the rate was made, and shall, subject to the provisions of this section, have a retrospective effect, subject to the proviso that, in the case of an amendment consisting of the inclusion in the valuation list either of a newly-erected or newly-constructed hereditament or an altered hereditament which has been out of occupation on account of structural alterations "the amendment shall have effect only "as from the date when the new or altered hereditament comes "into occupation." He says that because this aerodrome is in course of erection and has not yet come into occupation, it follows that the contractors' buildings must be in the same position. Speaking for myself, I cannot see that that argument is sound or that that conclusion can be drawn from the words of the proviso which I have just read, because that which the rating authority here seek to rate has been constructed and has come into occupation. Take, for instance, what seems to me to be an apt illustration of the whole here, the workmen's canteens. The contract obliges the contractors to provide mess canteens for the workmen who are on the premises and obliges them to serve meals there, which means that they have to erect a building of some material; it matters not what. They have to erect buildings for the men to sit in to have their meals, and for the cooks to prepare their meals, and those buildings have been made and occupied and are in daily use. Therefore, it seems to me that to those buildings s. 37 cannot apply. It is true that the building is in one sense ancillary to the main undertaking, the aerodrome, but only in the sense that if the aerodrome was not being constructed the building would not be there. Not only the mess room, but the other portions of the hereditament which it is here sought to rate have all been erected for the purpose of enabling Messrs. Laing & Son to carry on their business. Of course, in constructing this aerodrome, they are carrying on their business. It is not the whole of their business, no doubt, because they may be carrying on business in other parts of England at the same time, but they have to find a place to store the material. They have to find a place on which to erect their mixers. They have to find space for doing a variety of other things and for a variety of other purposes, all connected, no doubt, with this aerodrome. Mr. Henderson concedes that if these things were put upon a field or a site which did not happen to belong to the owners of the aerodrome, these buildings would at once become rateable. They would become rateable because they were occupied; but they are occupied here.

His argument would be stronger, I think, if the case of *W. H. Smith* v. *Lambeth Assessment Committee* (1) was still law, but that case has been overruled now by *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (2). It is there laid down—and the House of Lords has now established for all time, unless and until it is reversed

(1) (1882) 10 Q. B. D. 327.

(2) [1936] A. C. 511.

1948

John Laing & Son, Ld. v. Assessment Committee for Kingswood Assessment Area.

Lord Goddard C.J.

by legislation—that "the crucial question must always be "what in fact is the occupation in respect of which someone "is alleged to be rateable, and it is immaterial whether the "title to occupy is attributable to a lease, a licence, or an "easement." In this case it is attributable to a licence, because if the building owner allows the contractor to come on to his land and erect buildings for the purpose of carrying out the contract, and allows his land to be occupied, not for the mere storage of a bucket or half a dozen scaffolding poles, but for hundreds of tons of cement and other material which it would be very inconvenient to bring on day by day, and is kept there, as a dump, he has certainly given the contractor a licence. It seems to me that the contractor is none the less occupying that land, occupying it as a licensee, and occupying it for the purposes of carrying on his business, thereby acquiring a beneficial occupation, because if he did not occupy that land, he would have had to occupy some other land, when, it would be admitted, he would have a beneficial occupation. Here he certainly gets a beneficial occupation, because he is enabled, by reason of his occupation, to carry out the contract which he is intended to execute. It sounded at first a very attractive argument, I admit, when Mr. Henderson put to us that if the building owner could not be liable, because he had no beneficial occupation while the place was under construction, so also a contractor could not be.

It may be that the result of this decision, if it goes higher and is upheld, will be that the rating authorities will claim to include in their valuation lists hereditaments which hitherto have not been included, on the ground that there is an occupation by building contractors or builders of the land on which the buildings are being constructed. It has always to be borne in mind that it has been pointed out that the occupation must be something more than a mere transient or purely temporary occupation. The illustration has been given of the showman's van, which comes on to land for a short period of a day or two, or a week. It is said it would be absurd to make the showman responsible for maintaining the poor in the parish for six months when he has only been entertaining the poor in the parish perhaps for two nights. That is as may be, and it may very likely be that the rating authorities would not be entitled to rate a man who is building a small house, or something of that sort, and who, for the purpose of convenience, put a load of sand or gravel on the land on which he was going to build. I say nothing about that, because each case must depend on its own facts, but in this case the building has occupied a very considerable period. I do not know whether it is yet finished, but, at any rate, the building seems to have been going on for two years.

Applying the principles which I find laid down very clearly in the judgment of Lord Russell of Killowen in *Westminster Council* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (1), I feel bound to answer the question raised in the special case, whether the appellants are in rateable occupation of all or any of the structures comprised in the hereditament, in the affirmative.

HUMPHREYS J. I agree with the judgment of my Lord. For my part, I always approach these difficult and complicated questions of rating with very great diffidence, and I like to be able to found my judgment on what I regard as the plain language of a statute. I think it is possible to do so here, because s. 37 of the Rating and Valuation Act, 1925, now contains the scheme which governs rating. I find in sub-s. 10 a provision that in the case of an amendment of a valuation list proposed by a rating authority consisting of the inclusion in the valuation list of a newly-erected or newly-constructed hereditament, the amendment shall have effect only as from the date when the new hereditament comes into occupation. As I understand it, that is a very plain direction that if a new building is added to other buildings already on the land, that new building shall not be rated until it comes into occupation, but shall then be rated like any other building. Here the case states that there was a proposal by the respondent rating authority to amend the current valuation list by adding thereto a hereditament situate near Charlton runway, " described as contractor's offices, canteens, huts, structures, land, etc."

As I understand it—and I have glanced at the photographs of many of those structures—they are completed structures, and the case states that they are structures which are being used by the contractors for the purpose of their business. I assume they are all necessary for the purpose of the business and some of them are required by the building owner, who is the Crown, and which the contractors were obliged to provide, whether they liked it or not—such things as offices, and canteens for the use of the men employed in the construction.

---

(1) [1936] A. C. 511.

That being so, I ask myself: Why should not those new buildings, now that they have come into operation, be rated? Mr. Henderson's answer, I think, is: Because, if they had not been the subject of a building contract, but had been still in the occupation of the building owner, he would not have been liable, since he was constructing a great work here of which they are just comparatively unimportant parts and of which they will form a temporary part, because ultimately, when the work of building an aerodrome is completed they will be pulled down and taken away. I do not think that is a correct proposition. We are not in fact dealing with a building owner who is himself constructing a large number of buildings. We are dealing with a contractor who has in fact built and completed a large number of buildings. I fail myself to appreciate the argument that because he is a building contractor and because he still has a great deal of work to do in other parts of the land which is the site of the building, therefore he should escape having to pay rates or being rated in respect of those buildings which in fact he has completed.

On that short ground I base my judgment in this case, and I agree with the result proposed by my Lord.

PRITCHARD J. I agree.

Question answered in affirmative.
Case remitted to quarter sessions.

Solicitor for appellants: *R. L. Mason.*

Solicitors for respondents: *Crossman & Co., Bristol; Field, Roscoe & Co., for Guy H. Davis, Gloucester.*

A. W. G.

WILTSHIRE COUNTY VALUATION COMMITTEE *v.* BOYCE.

WILTSHIRE COUNTY VALUATION COMMITTEE *v.* MARLBOROUGH AND RAMSBURY RATING AUTHORITY AND ORCHARD.

C. A.

1948

Feb. 23, 24; *Mar.* 15.

Scott, Asquith and Evershed L.JJ

Rating — Exemptions — Lands exempted by private Act from " all " parochial taxes and duties "—No scheme made—Exemption from general rate—Land let on nine hundred and ninety-nine years lease—" Belongs " to freeholder — Stat. 17, *Geo.* 3, *c. cxxv—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 2, *s.* 64, *sub-ss.* 1 *and* 2, *s.* 69, *sub-s.* 2.

By a private Act of 1777 all lands within the parish of R. " which " shall belong to the vicarage of the same parish shall . . . . be " and for ever remain free from and discharged of all parochial " taxes and duties whatsoever," subject to a condition. That condition had always been, and still was, satisfied, and the lands of the vicarage in the parish had accordingly always been exempted from the poor rate. By the Rating and Valuation Act, 1925, the poor rate was replaced by a general rate, and it was proposed in 1946 that those lands should be included in the valuation list for the new rating area.

Held (1.) that the Act of 1925 made no change in the nature of the rate, the only change being the enlargement of the area in which it was collected from the parish to the district or county: (2.) that s. 64, sub-s. 1 and s. 69, sub-s. 2 of the Act of 1925 expressly preserved the exemption: (3.) that the word " parochial " was used in the private Act in contradistinction to " parliamentary ": and (4.) that the exemption in the private Act from parochial taxes exempted the land in question from the general rate.

Some of the land in question had been demised to the local council on a nine hundred and ninety-nine years lease.

Held, that that land still " belonged " to the vicar within the meaning of the private Act.

Decision of the Divisional Court [1947] K. B. 950 affirmed.

APPEAL from Divisional Court.

A private Act of Parliament (17 Geo. 3, c. cxxv.) of 1777, provided, inter alia: " That all the lands, tenements, tythes, " hereditaments, rights and properties, within the parish of " Ramsbury . . . . which shall belong to the vicarage of " the same parish, shall from and immediately after the date " and execution of the award of the . . . . commissioners, " . . . . be and for ever remain free from and discharged of all " parochial taxes and duties whatsoever, so long as the vicar

C. A.

1948

Wiltshire County Valuation Committee
v.
Boyce.

Wiltshire County Valuation Committee
v.
Marlborough and Ramsbury Rating Authority and Orchard.

" of the said parish for the time being shall do and perform all " the offices of the church as vicar, for the poor of the said " parish who shall receive alms, without fee or reward, and no " longer."

An award under that Act relating to the land in the parish of Ramsbury which belonged to the vicarage was made and executed on September 18, 1778, and that land had been exempted from rates ever since. A part of that land was let to the respondent Boyce under a yearly tenancy and a part, which had been demised to the respondent district council for nine hundred and ninety-nine years, was in the occupation of the respondent Orchard, who was the sub-tenant of the council. The nine hundred and ninety-nine years' lease to the respondent council included covenants by the council to pay rent and to repaint and repair. It also included a power of re-entry if these covenants were not complied with, and mines were reserved.

The appellants proposed in 1946 that these hereditaments should be included in the valuation list for the rating area. The local assessment committee rejected that proposal. The appellants appealed to Wiltshire Quarter Sessions, and the justices, at the request of all the parties, stated a case for the opinion of the Divisional Court.

It was agreed (1.) that the vicar of Ramsbury still performed the offices of the church as vicar for the poor of the parish who should receive alms, without fee or reward, in accordance, with the Act of 1777 (hereafter referred to as " the private " Act ") (2.) that no scheme had been made or approved pursuant to s. 64 of the Rating and Valuation Act, 1925; and (3.) that subject to the determination of the question raised in the case the respondents Boyce and Orchard were in rateable occupation of the hereditaments in question.

The Divisional Court (1) held (i) that the exemption in the private Act continued to apply after the passing of the Rating and Valuation Act, 1925 (2) in favour of the respondent Boyce

(1) [1947] K. B. 950.

(2) Rating and Valuation Act, 1925, s. 2, sub-s. 2: " As from " the appointed day the rating " authority of each rural rating " area shall, in lieu of making a " poor rate for each parish, make " and levy a general rate for the " whole of the district."

Section 2, sub-s. 3: " Subject " to the provisions of this Act, " every general rate shall be a rate " at a uniform amount per pound " on the rateable value of each " hereditament in the rating area, " and shall be made, levied and " collected, and shall be " recoverable, in the same manner and (ii.) that the land demised on a nine hundred and ninety-nine years lease "belonged" to the vicarage within the meaning of the private Act, and that the exemption therefore applied to it in favour of the other respondents also. The appellants appealed.

Harold Williams K.C. and *Squibb* for the appellants. The words of s. 2, sub-s. 3, of the Rating and Valuation Act, 1925, which direct that a general uniform rate shall be levied on each hereditament in the rating area, completely destroy any previous exemption from the payment of poor rate. Proviso (*a*) to s. 2, sub-s. 3, provides for a continuation of such an exemption for a limited period only, viz., until the date of the

---

"in which at the commencement "of this Act the poor rate may "be made, levied, collected and "recovered, and all the enact-"ments relating to the poor rate "which are in force at the com-"mencement of this Act . . . . "shall, so far as not repealed by "this Act, apply to the general "rate: Provided that—

"(*a*) In the case of any general "rate made in a rural rating area "in respect of any period before "the date of the first new "valuation, the rating authority "shall, notwithstanding anything "in this subsection, give effect "in the collection of the rate to "any exemption or abatement "to which any person would have "been entitled in respect of any "hereditament if the rate had been "a poor rate; . . . ."

Section 64, sub-s. 1: "Subject "as otherwise expressly provided "in this Act, nothing therein "contained shall affect . . . .

"(*b*) any exemption from or "privilege in respect of rating "conferred by any local Act . . . . "on the occupiers of heredita-"ments in any particular part of "a rating area or on the occupiers "of any particular heredita-"ments."

Sub-section 2: "For the pur-"pose of securing the continued "operation, notwithstanding the "passing of this Act, of any "such privilege or exemption as "aforesaid—

"(*a*) the rating authority . . . . "shall, before the appointed day, "submit to the Minister a scheme "making provision . . . . for the "purpose aforesaid;

"(*b*) if no such scheme is sub-"mitted by the rating authority "before the appointed day, the "Minister may himself make a "scheme for the purpose afore-"said; . . . ."

Provided that the rating authority and all persons interested in the hereditament may agree that the privilege or exemption shall be surrendered and extinguished in consideration of such payments as may be agreed between them.

Section 69, sub-s. 2: "References in any Act . . . . to "any rate in lieu of which a "general rate under this Act is "levied . . . . shall, unless the "context otherwise requires and "subject as hereinafter provided, "be construed as references . . . . "to the general rate . . . ."

C. A.
1948

WILTSHIRE COUNTY VALUATION COMMITTEE v. BOYCE.

WILTSHIRE COUNTY VALUATION COMMITTEE v. MARLBOROUGH AND RAMSBURY RATING AUTHORITY AND ORCHARD

first valuation. That proviso must have been inserted for some purpose. The only purpose for which it could have been inserted was to continue exemptions which would otherwise have come to an end. The effect of sub-s. 3 read together with proviso (*a*) is that exemptions from paying poor rate must come to an end at the date of the first valuation.

That provision is something " otherwise expressly provided " by the Act " within the words of s. 64, sub-s. 1. But sub-s. 1 of s. 64 does not in any event give continued operation to an exemption by itself. By sub-s. 2 of s. 64 a scheme has to be prepared for the purpose of securing the continued operation of the exemption. In the present case no scheme was prepared and the exemption, therefore, came to an end.

A general rate levied under an Act of Parliament is not a " parochial " rate, *Palmer* v. *Earith* (1), *Richards* v. *Overseers of Kidderminster* (2), and the rate levied under the 1925 Act is not a " parochial tax or duty " within the meaning of the private Act. The word " parochial " is inapt to describe a uniform general rate levied over a wholly rural district containing several parishes. Parliament intended to use " parochial " in a limited sense in the private Act. In return for freedom from taxation peculiar to the parish of Ramsbury the incumbent was placed under an obligation to perform, free of charge, certain public duties which were also limited to that parish.

Land leased to the council for nine hundred and ninety-nine years cannot be said to belong to the vicar within the meaning of the private Act and therefore the exemption should not in any event apply to that land.

Blanco White K.C. and *McGougan* for the respondents, the Marlborough and Ramsbury Rating Authority and Orchard. Land let on a nine hundred and ninety-nine years' lease belongs to the freeholder. The word " belonging " in a statute has been construed to mean legal ownership, *A. G.* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (3).

[SCOTT L.J. The word " belonging " was there used in a special contest. That decision is irrelevant in construing the word " belong " in the private Act.]

This is not a case of the freeholder having no interest for nine hundred and ninety-nine years. The land " belongs " to him in the natural meaning of that word. The purpose of the private Act was to provide the vicar with an income. By letting his land rate-free he is able to obtain a larger rent and enjoy a larger income. The Act itself contemplates his lands being let. The words " be and for ever remain " imply that the exemption should continue during a letting. In *Doe dem. Jackson* v. *Hiley* (1) land let on a forty year lease was held to belong to the freeholder.

---

(1) (1845) 14 M. & W. 428.

(2) [1896] 2 Ch. 212.

(3) (1862) 7 H. & N. 840.

The only local tax levied before the Rating and Valuation Act, 1925, was the poor rate. A different poor rate was levied in each parish. Out of this rate the expenses were paid of a number of bodies, such as county and district councils, who raised the moneys required by them by sending precepts to the parish overseers, see Konstam, The Rating and Valuation Act, 1925, 2nd ed., at pp. 25, 26. The rate was still called the " poor rate," although it was levied for a number of purposes : *City of London Corporation* v. *Associated Newspapers, Ld.* per Lord Parker and Lord Sumner (2) ; " Parochial tax " means " poor rate " : *Mitchell* v. *Fordham* per Abbott C.J. (3).

The general rate levied under the 1925 Act is a " parochial " tax " because it extends over the whole parish, although it extends beyond it. The Act of 1925 has expressly dealt with this matter. Section 2, sub-s. 3, says that all enactments relating to the poor rate shall apply to the general rate. The private Act is an " enactment relating to the poor rate." Further s. 69, sub-s. 2, of the Act of 1925 states that references in any Act to any rate in lieu of which a general rate is levied under that Act shall be construed as references to the general rate. The reference in the private Act to " parochial taxes " includes the poor rate. Therefore the words " general rate " should be read as inserted into the private Act in place of the words " parochial taxes." " Parochial taxation " is to be contrasted with " parliamentary taxation." " Parliamentary " taxation " comprises taxation for the benefit of the whole kingdom, such as income tax : *Pole-Carew* v. *Craddock* (4). " Parochial taxation " includes all local taxation.

Sub-section 1 of s. 64 of the Act of 1925 by itself expressly continued the exemption conferred by the private Act. Sub-section 2 was inserted in order to cover complicated cases where a scheme was necessary. The Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (5), contemplated the fact that some hereditaments would be totally exempt,

---

(1) (1830) 10 B. & C. 885.
(2) [1915] A. C. 674, 697, 699.
(3) (1827) 6 B. & C. 274, 276.
(4) [1920] 3 K. B. 109.
(5) St. R. & O. 1932, No. 395.

C. A.
1948

WILTSHIRE COUNTY VALUATION COMMITTEE *v.* BOYCE.

WILTSHIRE COUNTY VALUATION COMMITTEE *v.* MARLBOROUGH AND RAMSBURY RATING AUTHORITY AND ORCHARD.

see r. 5 (ii.) " Any exemption . . . . in respect of rating " in s. 64, sub-s. 1 (*b*), means any exemption from local taxation. Rating is the English system of local taxation. Where the exemption is total no scheme under s. 64, sub-s. 2, is necessary. The exemption must be within sub-s. 1 of s. 64 if s. 64 has any application at all. Sub-section 2 only provides for schemes " for the purpose of securing the continued operation . . . . " of any such . . . . exemption as aforesaid," i.e., only for continuing exemptions already covered by sub-s. 1. It is not in the power of a ratepayer to make a scheme. Section 64, sub-s. 1 (*b*), gives the ratepayer a right to the exemption, and sub-s. 2 merely provides the machinery. This right cannot be taken away by the failure of an administrative body to provide that machinery.

Dare for the respondent Boyce. The object of the Act of 1925, like that of the Valuation (Metropolis) Act, 1869 was to affect machinery, not to alter the incidence of rates: *City of London Corporation* v. *Associated Newspapers, Ld.* per Lord Parker (1).

A scheme under sub-s. 2 of s. 64 may limit the scope of an exemption that would otherwise be a total exemption under sub-s. 1 (*b*), but until a scheme is made the full exemption must continue. The Act lays down no time limit within which a scheme must be prepared. The argument that there can be no exemption unless there is a scheme is untenable. Suppose Parliament refused to sanction a scheme because it did not accord a person objecting to it the exemption to which he was entitled. It would follow, according to that argument, that he would then have no exemption at all.

Harold Williams K.C. replied.

Cur. adv. vult.

March 15. SCOTT L.J. [delivering the judgment of the court:] This appeal raises the question whether an exemption in a Local and Personal Act of 1777, conferred on the Vicar of Ramsbury in Wiltshire, by which all lands " which shall belong " to the vicarage . . . . shall be and for ever remain free " from and discharged of all parochial taxes and duties " whatsoever," subject to a condition which had been performed, still holds good. The question in issue is whether the general rate, imposed by s. 2, sub-s. 2, of the Rating and Valuation Act, 1925, in lieu of the poor rate, has destroyed the exemption

(1) [1915] A. C. 674, 696.

granted by the Act of 1777. It is, we think, the first time since the Act of 1925 came into force that this issue of interpretation has been raised. We will therefore discuss it as a pure question of construction, although several decisions of this court and of the House of Lords in earlier years have been cited to us.

The question depends upon the proper interpretation of the Act of 1925, in the light of the supercession by it of the old "poor rate," and the substitution of the new "general rate." The first step therefore is to see what the poor rate was. In essence it was a piece of administrative machinery for collecting money, at first limited in use to the purposes defined in a Statute of Elizabeth, but progressively used in the intervening period down to the Act of 1925 for obtaining the necessary funds from the occupiers of land for numerous heads of expenditure on local administration. The mechanism continued to be based on the parish, but the purpose was for expenditure throughout a much wider area. When the Act of 1925 put all, or most, of the particular purposes, for which money had to be collected, under the one umbrella of the "general rate" there was no change in the legal substance of the pecuniary liability so imposed. The old poor rate was always a local tax or duty and not a national tax or duty. The enlargement of the area of collection from the parish to the district and county in rural England made no change of substance. The poor rate was a parochial tax in the sense that it was collected over that unit of area: but the word "parochial," in our opinion, owed its adoption to the mere statutory accident that the parish was the unit of area over which it was from the first exigible. It was with equal propriety called a parochial duty. And as the heads of public expenditure became more numerous the poor rate became wider in its scope: so much so that, when the Act of 1925 adopted the word "general" in place of the word "poor," Parliament made no change in the heterogeneous character of the imposition on occupiers, but only enlarged the ambit of the area for the administrative convenience of easier collection. The previous indirect practice of the authorities concerned in the other heads of local expenditure by which they obtained their money through the poor rate machinery by means of precepts upon the poor rate authorities was made direct: one bite at the cherry instead of two.

It follows from those considerations that a special privilege or exemption expressed to be perpetual, granted by a local and personal Act, like that of 1777, to the owner of a particular piece

C. A.

1948

Wiltshire County Valuation Committee v. Boyce.

Wiltshire County Valuation Committee v. Marlborough and Ramsbury Rating Authority and Orchard.

of land, could not be abrogated or impaired by a subsequent statute unless it was addressed in plain language to that land: for generalia specialibus non derogant. We can find no such "special" cancellation or abrogation in the Act of 1925. Sub-sections 2 and 3 of s. 2 are quite general. On the contrary we think the Act in terms preserves intact any such exemption, and even a privilege falling short of an exemption. Section 64, sub-s. 1, provides that: "Subject as otherwise expressly "provided in this Act, nothing therein contained shall affect ". . . . (*b*) any exemption from or privilege in respect of rating "conferred by any local Act or order on the occupiers of "hereditaments in any particular part of a rating area or on "the occupiers of any particular hereditaments." So far from the rest of the section "providing otherwise" sub-s. 2 has, we think, the effect of maintaining existing exemptions. The argument was put forward for the appellant committee that the "scheme" permitted by sub-s. 2 was a condition of the continuance of the exemption, but we do not so read it. The only purpose of the authorized scheme is "to secure the "*continued operation* of any *such* privilege or exemption," i.e., that mentioned in sub-s. 1 (*b*). Even the proviso at the end of sub-s. 2 points to that construction. Section 69 sub-s. 2 confirms it almost expressly. Indeed, the language of the first paragraph of that sub-section can be only regarded as a positive enactment that the exemption in question granted by the Act of 1777 shall be construed by the court as a reference to the general rate under the Act of 1925. It is to be noted that the Act of 1777 is not amongst those repealed by sch. VIII to the Act of 1925.

An argument was addressed to us by Mr. Williams that because the general rate is levied over a county or a district under the present system of local government it cannot be said to be "parochial." We do not agree. The administrative convenience, for which the wider area was adopted, did not prevent the rates collected from all the parishes in the area being still parochial. The word is in our opinion used in contradistinction to imposts imposed by Parliament. Similarly the words "taxation" or "tax" are not limited to Parliamentary imposts collected by the Exchequer. The poor rate of Elizabeth was called "taxation."

Finally it was said that the vicar had forfeited the right to exemption because when he granted the lease for nine hundred and ninety-nine years the land ceased to "belong" to him within the meaning of the Act of 1777. We do not agree. He remained the freeholder, and that is, we think, by itself enough; but in addition all mines were reserved, the covenants gave him most of the continuous control of an owner who has granted a lease for say five years, and he has a right of re-entry on any breach. The object of the old Act was to provide income for the vicar by freeing the land for ever from the burden of all parochial taxes and duties whatseover. He now receives a better income in consequence. We think he is entitled to go on receiving it.

For these reasons we think the two appeals should be dismissed with costs.

Appeals dismissed.

Solicitors for appellants: *Radcliffes & Co., for P. A. Selborne Stringer, Clerk of Wiltshire County Council.*

Solicitors for respondent Boyce: *Wallace, Pyman & Co., for Phelps & Lawrence, Ramsbury.*

Solicitors for the other respondents: *Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett.*

R. P. C.

BROOKES AND ANOTHER *v.* PRESCOTT AND OTHERS.

C. A.
1948
May 5, 6.

Somervell and Cohen L.JJ.

Practice—Discovery—Affidavit of documents—Objection to producing police note-books—Ground of objection that the note-books related solely to the defendants' case and not to the plaintiffs' case—Objection upheld.

In an action by two plaintiffs against six members of the police force for damages for assault and false imprisonment, the defendants made an affidavit of documents which included six police note-books for which protection from discovery was claimed on a ground which failed before Cassels J. On appeal the defendants made a new affidavit of documents in which it was stated that one of the note-books contained nothing relevant but the owners of the five other note-books claimed protection from discovery on the ground that to the best of their knowledge, information, and belief, their note-books related solely to the defendants' case and not to the plaintiffs' case and did not in any way tend to support or prove the plaintiffs' case or to impeach the defendants' own case.

Held that while on the affidavit before Cassels J. his decision was right, the further affidavit, which had been admitted, entitled the defendants to protection from discovery in respect of the five material note-books, seeing that the ground on which protection was claimed was based on principles laid down in *Frankenstein* v. *Gavin's House-to-House Cycle Cleaning and Insurance Co.* [1897] 2 Q. B. 62 and *O'Rourke* v. *Darbishire* [1920] A. C. 581.

It must not be taken, however, that production of any police note-book can be refused in circumstances of this kind and is properly covered by a statement such as that in the present affidavit. A policeman's note-book may contain entries helpful to a plaintiff's case or dangerous to his own case.

APPEAL from Cassels J. sitting as judge in chambers.

In an action being brought by two plaintiffs against five police constables and a superintendent of police claiming damages for assault and false imprisonment an order was made on the summons for directions in the Liverpool District Registry requiring the defendants to make an affidavit of documents. An affidavit was therefore made by the defendants in which it was stated that each of the defendants had a note-book issued to him by the chief constable of Wallasey which they respectively objected to produce on the ground that these note-books consisted solely of memoranda which would be referred to by them when it was necessary to refresh their memories on matters in question in the suit. On April 5, 1948, the plaintiffs gave notice of application to inspect the note-books and on April 6 Cassels J. made an order for production of the note-books within seven days. The defendants appealed with the leave of the judge and on April 20, 1948, they made a further affidavit of documents in which it was stated that the note-book of one of them contained nothing relevant and had been included by mistake in the earlier affidavit and the owners of the remaining five note-books claimed protection from discovery on the ground that to the best of their knowledge, information and belief, these note-books related solely to the defendants' case and not to the case of the plaintiffs and did not in any way tend to support or prove the plaintiffs' case or to impeach the defendants' own case.

Glynn Blackledge for the defendants. A recognized ground on which privilege for production of any documents can be claimed is that they relate solely to the party's own case: see Annual Practice, 1947, p. 525. The matter set out in each of the five police note-books is in fact a proof of the evidence the officer was to give at the trial. If the plaintiffs were given inspection of the note-books they would see the whole or the greater part of the defendants' evidence. In such a case inspection ought not to be granted: *Benbow* v. *Low* (1); *In re Strachan* (2). In the latter case the matter related to documents in the possession of the court, but the principle applicable is the same. It is difficult to argue that the reason first set up for not allowing inspection is sufficient but the court is asked to admit the further affidavit made since the hearing before Cassels J. It is the reason given there that states the proper ground for refusing to allow inspection: *Frankenstein* v. *Gavin's House-to-House Cycle Cleaning and Insurance Co.* (3). In *O'Rourke* v. *Darbishire* (4) it was said by Lord Finlay after recognizing the correctness of the form of words adopted that privilege from production was not confined to documents admissible in evidence. It could therefore apply to the police note-books in this case although the documents could only be used by the officers to refresh their memories. The cases already cited are the principal authorities applicable here but in *Bewicke* v. *Graham* (5) the conclusiveness of an affidavit in the present form was recognized: see also 10 Halsbury's Laws of England (2nd ed.), p. 400.

Selwyn Lloyd K.C. and *Glyn Burrell* for the plaintiffs. The defendants ought not to be allowed to put in the further affidavit. They cannot put themselves right by raising a question not raised before Cassels J.: see R. S. C. Or. 58, r. 4, as to putting in a new affidavit.

[SOMERVELL L.J. Surely a further affidavit can always be put in in interlocutory proceedings? In any case we should, if necessary, give leave to put it in here.]

Further, Cassels J. had a discretion as to the order to be made which ought not to be interfered with.

[SOMERVELL L.J. We recognize that Cassels J. was right on the evidence before him.]

The note made by an officer in regard to an event cannot relate exclusively to his own case. In *Frankenstein's* case (3) the issue was whether 12,500 persons had submitted themselves for enrolment in the defendant company. That is a very different case from one where inspection was asked of contemporary notes in regard to the plaintiff's alleged offence and that in totally different proceedings. For example, if a doctor is sued for professional negligence, can he refuse to give inspection of his notes of the treatment used? This is a similar type of case. The plaintiffs are seeking inspection of contemporary records of what took place in relation to their arrest and other matters for which they say there was no justification. These records cannot be said to relate exclusively to the defendants' case. *Attorney-General* v. *Emerson* (1) shows the attitude that the court should adopt towards the defendants' affidavit and that it should consider whether the documents relate solely to the defendants' case and justify what is said in the affidavit. How can it be said that notes as to the conveying of the plaintiffs to the police station are not material to their case?

---

(1) (1880) 16 Ch. D. 93.
(2) [1895] 1 Ch. 439.
(3) [1897] 2 Q. B. 62, 65.
(4) [1920] A. C. 581, 606.
(5) (1881) 7 Q. B. D. 400.

[SOMERVELL L.J. A comparison of the defence with the note-books might well show that the defence merely expressed in more legal language what is in the note-books.]

In *In re Strachan* (2) the judgment of A. L. Smith L.J. showed that there inspection was sought for a purpose that it was not right for the Master in Lunacy to further. The present is an entirely different case. Why should records of what passed in this case not be available to both sides?

No reply was called for.

SOMERVELL L.J. This is an appeal from an order of Cassels J. made on April 6, 1948. The action is one brought by two plaintiffs against five police constables and a police superintendent, and the claim is for damages for false imprisonment and assault in connexion with events which appear to have taken place on January 10, 1948. Put shortly, the plaintiffs say that the police constables assaulted them and falsely imprisoned them and took them off to the police station, where the superintendent was involved in the alleged tort. The defence is a denial of any tort and it is said that the constables "requested the plaintiffs to alight from the car in the course of "inquiring whether they or either of them were drunk or "under the influence of drink to such an extent as to be unfit "to have charge of the said vehicle"; that the car was drawn up in a cul-de-sac off the main road without lights; that the man who was driving was intoxicated and, as he was going to be taken to the police station, inquiries were made of the others to see whether they were fit to be left in charge of the car. Then it is common ground, I think, that the plaintiffs

(1) (1882) 10 Q. B. D. 191.

(2) [1895] 1 Ch. 439.

were taken to the police station; but the defendants deny that they did anything wrongful. That is the short nature of the action.

There was an order made for discovery. Mr. Blackledge suggested that it was not an appropriate case for such an order; but, as the order was made, we are not concerned with that issue. [His Lordship then stated the facts in regard to the first affidavit of documents.] On that affidavit the plaintiffs applied for inspection of the police note-books. The matter came before the learned judge and the learned judge ordered "that the plaintiffs by their solicitors be at liberty to inspect the documents." In my opinion, on the matter as it was then before the learned judge that order was rightly made. There seems to me to be nothing in the affidavit which entitles the defendants to refuse to produce these documents.

An appeal was made against that order and a further affidavit was sworn. Mr. Selwyn Lloyd raised the question whether the defendants should be allowed to rely on this affidavit sworn after the learned judge's order. If leave was necessary to enable the defendants to rely on that, we decided that it was a case in which leave should be given, and therefore the appeal comes before us on the basis of this second affidavit. Mr. Blackledge, in explaining why the point in this affidavit was not taken in the first affidavit, said very frankly that at that time he, as the legal adviser of the defendants, was not fully appraised of the law relating to this matter and that the point now before us which is an important point, was not fully present to his mind. That explains why a further affidavit was put in. In that affidavit there is this paragraph referring to the documents in question: "To the best of the knowledge, "information and belief of us"—and then the names of the defendants other than Harold Kelly whose note-books are now involved are set out "the last mentioned documents relate "solely to our own and Harold Kelly's case and not to the case "of the plaintiffs, and do not in any way tend to support or "prove their case or to impeach our own or Harold Kelly's "case."

That paragraph is based on principles which have been laid down in various cases, but I think that it will only be necessary for me to refer to two of them. The first is *Frankenstein* v. *Gavin's House-to-House Cycle Cleaning and Insurance Co.* (1), which was decided by the Court of Appeal, consisting of Lord

(1) [1897] 2 Q. B. 62.

Esher M.R., A. L. Smith L.J. and Chitty L.J. The headnote is as follows: "In an action for an alleged mis-representation "in the prospectus of a company the statement complained "of was that 12,500 persons had enrolled themselves as annual "subscribers to the company. In an affidavit of documents "the defendants stated that they had in their possession "12,500 applications by persons wishing to be enrolled as "annual subscribers to the company, but that they objected "to produce them on the ground that they were part of the "evidence supporting the defendants' case, and did not support "or tend to support the plaintiff's case, and contained nothing "impeaching the case of the defendants. Held, that the "plaintiff was not entitled to inspection of the applications." In the course of his judgment, Chitty L.J. said (1): "The "defendants mention in their schedule of documents 12,500 "applications by persons wishing to become subscribers, "and they object to allow inspection of those applications on "the ground that they form part of the evidence in support "of the defendants' case, and do not support or tend to support "the plaintiff's case, and contain nothing impeaching the "defendants' case. That," says Chitty L.J., "is the proper "affidavit to make in support of the claim of privilege." It will be noticed that in that passage Chitty L.J. mentions that part of the objection was that the documents "form "part of the evidence in support of the defendants' case." In the House of Lords in *O'Rourke* v. *Darbishire* (2), a number of points were argued and among them this: In this class of privilege is it necessary that the documents in respect of which inspection is resisted should be documents which in themselves are admissible as evidence? and it was held that the claim against production for inspection was not restricted to documents in themselves admissible in evidence. That point was fully argued and, although I think that most of their Lordships took the view that the matter could have been decided, so far as that particular part of the case was concerned, on other grounds, it was dealt with, I think, in all the speeches of the noble and learned Lords. Lord Finlay set out the affidavit the validity of which was under consideration in these terms (3): "To the best of our knowledge information "and belief the said documents Nos. 434 and 436 and (so far "as we object to produce the same) 437 either do not in any

(1) [1897] 2 Q. B. 65.
(2) [1920] A. C. 581.
(3) Ibid. 605.

"way relate to the matters in issue in this action or in so far "as they do relate to the same relate solely to our case and to "the case of our said co-defendants and not to the case of the "plaintiff and do not in any way tend to support the plaintiff's "case or impeach our own." As will be seen, in all essential matters the affidavit in the present case follows the form considered in that case.

I might say a word in passing on the expression "relate "solely to our case." What that means is, I think, perfectly clear in the context. The same word, "relate," is used by Lord Finlay. Of course, in one sense a document which assists the defence to make out its case relates to the plaintiff's case in that the defendant hopes that it will destroy the plaintiff's claim; but what is clearly meant by the word "relate" here having regard to the words which follow, is that there is nothing in the documents which helps the plaintiff to establish his case or which tends to defeat the defence. Lord Finlay held that the privilege claimed is not confined to documents which are admissible in evidence. He said: "A party is entitled to get inspection of any documents "relating to his own case." Again, I think that "relating" must clearly bear the sense which I have indicated. "He is "not entitled to see documents relating exclusively to his "opponent's case in order that he may prepare means of "meeting it or try to discover flaws in it." I think, at any rate for the moment, that that is sufficient authority.

It is claimed that the note-books are not liable to be produced, by reason of the paragraph in the affidavit, which in terms has been held in the House of Lords to be a proper ground on which the production of documents can be resisted. What then does Mr. Selwyn Lloyd say? He took, first, the point about the admission of the further affidavit, with which I have dealt. He also suggested that this was a case in which this court would not interfere with the learned judge's discretion; but I do not think that that is a principle which can assist us because, having admitted the second affidavit, we are dealing with the matter on a different basis from that on which the learned judge dealt with it. No discretion then which he may have exercised, when the matter was presented to him in a different form, can assist us in coming to our conclusion on the matter as it is now presented to us. Mr. Selwyn Lloyd stressed the word "exclusively" in the passage which I have read from Lord Finlay's judgment; but I think that that is

C. A.
1948

BROOKES
v.
PRESCOTT.

Somervell L.J.

merely expressing in one word what appears in the affidavit in that case, as in this case, namely, the statement that the documents " relate *solely* to our case and to the case of our said " co-defendants and not to the case of the plaintiff and do not " *in any way* tend to support the plaintiff's case or impeach " our own." Then he took the point (and this was his main point) that no contemporary record, such as, it may be assumed, is contained in a policeman's note-book, can be the subject matter of this form of privilege from production. He referred us to *Attorney-General* v. *Emerson* (1). I do not think it necessary to go into the facts of that case, but he referred to a passage in the judgment of Brett L.J., where he said (2): " Where therefore from the nature and description of the " documents the court feels certain in the sense that I have " described that the documents will assist the plaintiff's case, " or will negative the defendant's case, of course then they will " not act upon the affidavit." I agree with that; indeed, it is the ratio decidendi and is binding on us. If from the nature of the document it is plain that the deponent in claiming the privilege must have misconceived the law, the court will not, of course, accept it as a valid claim against production. I do not myself see how it can be said that that applies to this case. Let me take one individual police constable who is sued for assault. He puts in a defence which may follow in all material matters, omitting nothing, the note which he has made at the time. If that were so, it seems to me that this note-book falls precisely within the principles which have been laid down, namely, that it is a document which relates solely to his own case and does not in any way impeach it or assist the case which the plaintiff seeks to make. In fact I think that, if one considers the nature of these documents as one would assume them to be from the description, they are of a class which, provided that their contents are such as to justify the swearing of the paragraph sworn in this case, might well fall within the principle recognized by more than one learned judge as justifying the claim of privilege. A note taken at the time, such as is presumably contained in these books, may well be in substance the evidence which the defendant will give to the court in support of his defence to the claim. It also might contain the names of other witnesses whom he desires to call—not necessarily, but it might do so.

Lindley L.J. in *In re Strachan* (3) used some words which I

---

(1) 10 Q. B. D. 191.
(2) Ibid. 204.
(3) [1895] 1 Ch. 439.

C. A.
1948
BROOKES
v.
PRESCOTT.
Somervell L.J.

will read in this connexion. I do not think that that case really helps, because it was dealing with documents in the custody of the court in lunacy, the right to see which depends on different principles, the court having a different and a wider discretion in dealing with them than in cases of the sort being considered here; but the same principles are relevant to the decision of the court in such a matter and were referred to by the learned Lords Justices. Lindley L.J. said (1): "In "England it is considered contrary to the interests of justice "to compel a litigant to disclose to his opponent before trial "the evidence to be adduced against him (see *Benbow* v. "*Low* (2)). It is considered that so to do would give undue "advantages for cross-examination and lead to endless side "issues; and would enable witnesses to be tampered with, and "give unfair advantage to the unscrupulous." There may be no question of witnesses being tampered with if these note-books do not contain the names of any other people who were present at the time; but they are or may be very much in the nature of evidence that is to be given. I think therefore that, having regard to the terms of the affidavit, this appeal succeeds.

I should like to make it clear (as indeed it is clear from the authorities) that this decision does not mean that production of any policeman's note-book can be refused in circumstances of this kind or could properly be covered by a paragraph such as we have in this affidavit. Such a note-book might well contain entries helpful to the plaintiff, in that they enabled him to establish his case; it might contain entries which were damaging to the defendant's case; but, if the affidavit on which we are deciding this issue, is accurate (and I have no reason, of course, to suggest that it is not), the principle to which I have referred enables the defendants to resist the application for production. In my opinion, therefore, the appeal must be allowed.

COHEN L.J. I agree and I desire only to add a word or two on the main point taken by Mr. Selwyn Lloyd. He relies for his argument on that point on the decision in *Attorney-General* v. *Emerson* (3), to which my brother has referred. The effect of that decision was summarized by Lord Esher M.R., in *Frankenstein's* case (4) as follows: "Each of the judges who "decided that case held in effect that such an affidavit as the

---

(1) [1895] 1 Ch. 439, 445.
(2) 16 Ch. D. 93.
(3) 10 Q. B. D. 191.
(4) [1897] 2 Q. B. 62, 64.

C. A.

1948

BROOKES v. PRESCOTT.

Cohen L.J.

"defendants in this case have made must be accepted as "conclusive, unless the court can see, that is to say, is "reasonably certain, from the statements of the party making "it, that he has erroneously represented or has misconceived "the character of the document in question, and that it is of "such a character that the party cannot properly swear to the "effect to which he is bound to swear in order to claim "protection. That being so, the case depends upon the question "whether we are reasonably certain that the defendants' "allegation that the applications in question have nothing to "do with the plaintiff's case but support the defendants' "case alone is not true." Applying that statement of the law to the present case, the only ground on which it is suggested that we could infer with reasonable certainty that the defendants' allegation that the note-books have nothing to do with the plaintiffs' case but support the defendants' case alone is not true, is the description of the note-books in the first affidavit. In my opinion, for the reasons given by my Lord, it is impossible to draw any such inference and, therefore, it seems to me that, applying the principle of *Attorney-General* v. *Emerson* (1) as summarized in *Frankenstein's* case (2), it necessarily follows that this appeal succeeds.

Appeal allowed.

Solicitors: *Chamberlain & Co., for Emrys Evans, Wallasey; J. Norton, Liverpool.*

(1) 10 Q. B. D. 191. (2) [1897] 2 Q. B. 62, 64.

H. C. G.

1948
Apr. 14, 15, 22.

Lord Goddard C.J., Humphreys and Pritchard JJ.

HIBBERT *v.* McKIERNAN.

Criminal law—Larceny—Trespasser, to his knowledge, takes golf balls, animo furandi, from private golf course—Golf balls abandoned by their owners—Property in golf balls laid in secretary and members of golf club—Special property in goods on land, in occupier of land, for purposes of charge of larceny.

The appellant trespassed on the private links of a golf club and there, animo furandi, took eight golf balls, which, it was found, had been abandoned by their former owners. A police officer was on special duty on the links to detect and apprehend persons taking golf balls and to warn off trespassers. He arrested the appellant who was charged with and convicted of stealing the balls, the property of the secretary and members of the golf club, contrary to s. 2 of the Larceny Act, 1916.

Held that the appellant was rightly convicted on that charge.

Per LORD GODDARD C.J. and HUMPHREYS J.: The question of the title to chattels discovered by an honest finder on the land of a person, who was not the actual owner of the chattels, did not arise in the case.

Per LORD GODDARD C.J.: Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property of which he is in possession and this confers on him a special property in goods found on his land sufficient to support an indictment, if the goods are taken therefrom, not under a claim of right, but with a felonious intent.

Per HUMPHREYS J.: Were it material, the intention of the members of the club to exercise control over the balls was proved by the steps taken by them to prevent other persons from interfering with them. It was not essential to name any person as the owner of the goods in an indictment for larceny.

Per PRITCHARD J.: Before it could be said that the members of the club had acquired a possession of the golf balls of such a nature that interference with it was capable of becoming the basis of a charge of larceny, it must appear that the members intended to exclude others from interference with the balls and that they had over them a degree of power which was sufficient to give effect to such intent. On the facts found, the members did so intend and had such power.

R. v. *Rowe* (1859) 23 J. P. 117, followed.

CASE STATED by Stockport justices.

Harold Hibbert, the appellant, who on October 4, 1947, had been watching the playing of golf on the Reddish Vale Golf Links, was arrested and found to be in possession of eight golf balls which had been picked up by him on the links on that day, one of the balls bearing a distinctive marking, which was lost by a member of the club on October 1, 1947, and later identified by that member. Before his arrest the appellant gave a false name and address, denied that he was in possession of golf balls and, when they were found in his possession, stated that he knew he had no right to take them. The balls had been abandoned by the original owners. The links were the joint property of the members of the Reddish Vale Golf Club to which the appellant had no right of access and the appellant knew that the police were keeping a watch on the links to prevent the taking of golf balls and for the warning off of trespassers, and he had been warned off the course previously by persons in authority. On various occasions before October 4, 1947, the appellant had retrieved lost balls for individual members of the club for gratuities, and had sold to individual members and, on occasion, to the assistant professional of the club, balls found by him on the links in circumstances similar to those in the present case, but on October 4, 1947, the appellant had not retrieved the golf balls found on him for or at the request of any particular member or members of the club.

On October 12, 1947, and November 5, 1947, the appellant was charged by Frederick McKiernan, police constable, the respondent, at a court of summary jurisdiction for that he on October 4, 1947, at Reddish in the county borough of Stockport, stole eight golf balls of the value together of 10*s.*, the property of the secretary and members of the Reddish Vale Golf Club, contrary to s. 2 of the Larceny Act, 1916.

The justices said that to succeed the prosecution must prove (*a*) that the golf balls found on him had an "owner," and (*b*) that the appellant fraudulently took the balls with the intent at the time of such taking, permanently to deprive the owner thereof. On the first proposition they discussed the following cases: *Armory* v. *Delamirie* (1), *Bridges* v. *Hawkesworth* (2), *R.* v. *Rowe* (3), *R.* v. *Ashwell* (4), *Elwes* v. *Brigg Gas Co.* (5), *South Staffordshire Water Co.* v. *Sharman* (6), *R.* v. *White* (7). *Hannah* v. *Peel* (8) and an unnamed case (9). The justices found that the eight golf balls had been abandoned by the original owners and that they were lying loose on the links, when found by the appellant. They said that the owner of land did not necessarily possess things lying unattached on its surface. If he did not necessarily possess them, there must be circumstances in which he did and other circumstances in which he did not possess such things. They required evidence other than that of the mere fact that the balls were lying on the links to satisfy them that they were in possession of the club. The only evidence of an intention by the club to exercise control over those golf balls was that a police officer was on special duty on the links, apparently to detect and apprehend persons taking golf balls from those links, and that it was in consequence of this special duty that the appellant was apprehended. In their opinion, however, this evidence prima facie established that the club was in possession of these golf balls and, accordingly, was their owner within the meaning of s. 1 of the Larceny Act, 1916. They held, therefore, that the

(1) (1722) 1 Stra. 505; Smith's Lead. Cas. (13th ed.), vol. I., 393.

(2) (1851) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(3) (1859) 23 J. P. 117.

(4) (1885) 16 Q. B. D. 190.

(5) (1886) 33 Ch. D. 562.

(6) [1896] 2 Q. B. 44.

(7) (1912) 107 L. T. 528; 76 J. P. 384.

(8) [1945] K. B. 509.

(9) (1913) 77 J. P. (N). 341.

golf balls found on the appellant could be stolen. They found that the prosecution had proved also the second proposition and that the appellant had in fact stolen the balls. They convicted him of the offence charged and fined him the sum of 1*l*.

E. Garth Moore and *Geoffrey Lane* for the appellant. By s. 1 of the Larceny Act, 1916: (1.) " For the purposes of this Act " a person steals who, without the consent of the owner " fraudulently and without a claim of right made in good " faith, takes and carries away anything capable of being " stolen with intent, at the time of such taking, permanently " to deprive the owner thereof . . . ." By sub-s. 2 (1.): " the expression 'takes' includes obtaining the possession " . . . . (*d*) by finding, where at the time of the finding the " finder believes that the owner can be discovered by taking " reasonable steps." By sub-s. 2 (iii.) " the expression 'owner' " includes any part owner, or person having possession or " control of, or a special property in, anything capable of being " stolen."

Golf balls are, no doubt, capable of being stolen, so long as they have an " owner " who can be deprived of them. These eight golf balls had no owner at the time of their finding. The justices found expressly that their original owners had abandoned them. It may be that the justices, in finding that the balls had been abandoned by their original owners, were confusing abandonment of the balls with abandonment of the search; but, be that as it may, there is an express finding of fact in the case stated that the balls themselves had been abandoned. They were, therefore, res nullius, unless the members of the Reddish Vale Golf Club had " possession, or " control of, or a special property in " them. But the members had no such possession, control of, or special property in, the balls. *Armory* v. *Delamirie* (1), *Bridges* v. *Hawkesworth* (2) and *Hannah* v. *Peel* (3) are all authorities for the proposition that the finder of things on land has a better title to them than the occupier or owner of the land. Mere occupation or ownership of land does not confer possession of everything on the land; were the rule otherwise, *Bridges* v. *Hawkesworth* (2) would have been differently decided. This may be the reason why eggs of wild fowl are not in anyone's possession until reduced into possession by taking. *South Staffordshire Water*

---

(1) 1 Stra. 505; Smith's Lead. Cas. (13th ed.), vol. I., 393.

(2) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(3) [1945] K. B. 509.

1948

HIBBERT *v.* MCKIERNAN.

Co. v. *Sharman* (1) and *Elwes* v. *Brigg Gas Co.* (2) can be distinguished, as in these two cases the things were not upon the land, but buried in it; quicquid plantatur solo, solo cedit. Furthermore *South Staffordshire Water Co.* v. *Sharman* (1) proceeded to some extent on a complete misunderstanding of the ratio decidendi in *Bridges* v. *Hawkesworth* (3) (vide the judgments in the two cases) and its authoritative value is thereby weakened. All land in the country belongs to someone and it follows, therefore, that if this decision of the justices is right, there can be no larceny by finding; but every time something is appropriated by a finder, the finder will, subject to a claim of right, be guilty of larceny from the owner or possessor of the land on which the thing was found.

[HUMPHREYS J. Surely the decision in *R.* v. *Rowe* (4) where the prisoner was convicted of taking iron lying on the bed of a canal is decisive in this case.]

The later decision of the Court of Criminal Appeal in *R.* v. *White* (5) seems to be inconsistent with it; and, furthermore, the iron had been buried underneath the water, whereas these golf balls were lying on the surface of the land.

Heathcote-Williams for the respondent: The members of the golf club were in possession of these golf balls when the appellant took them.

[LORD GODDARD C.J. Do you concede that if the members were not then in possession of the balls, the appellant was wrongly convicted?]

Yes, I think so. But here they had such intent. See Oliver Wendell Holmes Jnr. in his chapter on "Possession" in The Common Law (1881) at pp. 216 to 224. He wrote at p. 216: "To gain possession, then, a man must stand in a "certain physical relation to the object and to the rest of the "world and must have a certain intent. These relations and "this intent are the facts of which we are in search." Later he wrote (at p. 220): "Such being the direct working of the "law in the case of possession, one would think that the "animus or intent most nearly parallel to its movement "would be the intent of which we are in search. If what the "law does is to exclude others from interfering with the "object, it would seem that the intent which the law should "require is an intent to exclude others. I believe that such "an intent is all that the common law deems needful, and that,

---

(1) [1896] 2 Q. B. 44.

(2) 33 Ch. D. 562.

(3) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(4) 23 J. P. 117.

(5) 107 L. T. 528; 76 J. P. 384.

"on principle, no more should be required." Again, he writes (at p. 222): "There can be no animus domini unless the "thing is known of; but an intent to exclude others from it "may be contained in a larger intent to exclude others from "the place where it is, without any knowledge of the object's "existence." And again (at pp. 223–4): "In a criminal case, "the property in iron taken from the bottom of a canal by "a stranger was held well laid in the canal company, although "it does not appear that the company knew of it, or had any "lien upon it (*R.* v. *Rowe* Bell C. C. 93). The only intent "concerning the thing discoverable in such instances is the "general intent which the occupant of land has to exclude the "public from the land, and thus, as a consequence, to exclude "them from what is upon it." But the evidence here was that the members of the club had obtained the services of a police officer on special duty on the links, apparently to detect and apprehend persons taking golf balls from these links. As the justices pointed out it was in consequence of that special duty that the appellant was apprehended. See also Pollock and Wright on "Possession in the Common Law" at pp. 11 to 16 on "the physical and mental elements of de facto possession" and at pp. 37 to 42 on "evidence of possession: goods." At p. 38 Sir Frederick Pollock writes: "A much more usual "case is that of goods in a building or on land, which are not "in any apparent specific custody. Here it is easy to fall back "on a positive rule of law; but it is worth while to consider "first what is the inference of fact from the situation of such "goods. It will hardly be denied that a man is in possession "in fact, as well as possessor in law, of his own goods in the "house which he occupies . . . . And outside the house the "same thing seems to be true. There is no magic in four walls ". . . . But a man will often, for example, take a book to a "friend's room and, finding the room empty, leave the book "on a table or desk without any practical fear for its safe-"keeping . . . . And though an occupier may have no "conscious specific intention concerning all the chattels in "his house, or on his land, it is certainly his general intention "that unauthorized persons shall not meddle with them." The justices here found that the appellant knew that the police were keeping a watch on the links to prevent the taking of golf balls and for the warning off of trespassers. See also Salmond's Jurisprudence (10th ed.), at pp. 285 to 299. At p. 298 the present editor writes of *Bridges* v. *Hawkesworth* (1): "Professor

---

(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

1948

HIBBERT v. MCKIERNAN.

"Goodhart after a full discussion makes bold to suggest that the "case was wrongly decided" ("Three Cases on Possession," Essays in Jurisprudence and the Common Law) "and it is "submitted that this is the better opinion. From a practical "point of view it is best to award possession to the occupier "of the place where the thing is found, because in this way the "loser, if he guesses where he dropped it, is most likely to come "by his chattel again." Winfield in his Law of Tort (3rd ed.), at p. 351 cites the words of Lord Russell C.J. in *South Staffordshire Water Co.* v. *Sharman* (1) where he said: "The general "principle seems to me to be that where a person has possession "of house or land, with a manifest intention to exercise control "over it and the things which may be upon or in it, then, "if something is found on that land, whether by an employee "of the owner or by a stranger, the presumption is that the "possession of that thing is in the owner of the locus in quo." Winfield adds: "The law, then, seems to be that, where things "are found in or upon land and their owner is untraceable, "the possessor of the land is presumed to be the possessor of "the things: but that this presumption is rebuttable by "evidence that the possessor had no manifest intention to "exercise control over the things." In this case the evidence of the employment of the special constable showed a manifest intention to exercise control over the golf balls.

The case of *Hannah* v. *Peel* (2) can be distinguished, since in that case the owner of the premises, where the article was discovered, was found never to have been in possession of them. The decision in *R.* v. *Rowe* (3) is decisive in this case. The members of the golf club, on the facts found here, were in possession of these golf balls, when they were taken animo furandi by the appellant.

E. Garth Moore replied.

Cur. adv. vult.

Apr. 22. LORD GODDARD C.J. The justices were of opinion that the appellant took the golf balls for the purpose of selling them, and they also found that the police were to the knowledge of the appellant watching for the purpose of preventing the taking of balls and warning off trespassers. In these circumstances, the justices were of opinion that in taking the balls the appellant meant to steal them and did steal them, but the case goes on to state at considerable length the questions of law which

(1) [1896] 2 Q. B. 44, 47.

(2) [1945] K. B. 509.

(3) 23 J. P. 117.

they considered arose, in the main as to whether the appellant acquired a title to the balls by finding them, which as they had been abandoned by their original owners, would prevail against the occupiers of the land on which they were found. This led them to consider a line of cases with regard to the title to chattels found on the land of a person who is neither the finder nor the original owner, the most conspicuous of which are *Bridges* v. *Hawkesworth* (1), *Elwes* v. *Brigg Gas Co.* (2), *South Staffordshire Water Co.* v. *Sharman* (3) and *Hannah* v. *Peel* (4). These cases, or rather the first three of them, have long been the delight of professors and text writers, whose task it often is to attempt to reconcile the irreconcilable. It is, however, right to say that in recent years both the Corpus Professor of Jurisprudence at Oxford and the Professor Emeritus of English Law at Cambridge have expressed the opinion that *Bridges* v. *Hawkesworth* (1) was wrongly decided. If it was, the difficulty largely disappears. But that much-battered case has lately been re-invigorated by Birkett J.'s decision in *Hannah* v. *Peel* (4), and I am glad to think that, for the reasons I am about to give, it is still for wiser heads than mine to end a controversy which will no doubt continue to form an appropriate subject for moots till the House of Lords lays it to rest for all time. I gladly pay tribute to the gallant and laborious effort of these justices to resolve the conflict. Probably no court of summary jurisdiction has ever before grappled so manfully with a really difficult question of law or stated their conclusions more clearly, and it will be disappointing to them to know that this court, notwithstanding a careful and learned argument by Mr. Garth Moore, is of opinion that these interesting questions do not in this case arise.

We are here dealing with a charge of larceny; with a thief who took the balls animo furandi; not with a honest man who, finding an article on the land of another, proclaims that fact with a view to discovering the owner if he can, and when no owner comes forward, asserts a possessory title against the owner of the land on which it was found. We need not be troubled with nice questions relating to animus domini, corpus possessionis, de facto control, or the like. Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land

---

(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(2) 33 Ch. D. 562.

(3) [1896] 2 Q. B. 44.

(4) [1945] K. B. 509.

1948

HIBBERT
v.
MCKIERNAN.

Lord Goddard
C.J.

sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent. This was the decision of the Court for Crown Cases Reserved in *R.* v. *Rowe* (1), a court of high authority especially considering the judges of whom it was comprised and whose decision is in any case binding on us. The prisoner in that case was convicted of stealing iron from the bed of a canal belonging to a company in whom the property was laid. The iron had fallen or been thrown overboard from barges and had been taken by the prisoner when the canal was drained. The court had no difficulty in affirming the conviction. There is not the least indication that the iron had sunk into the bed of the canal or that the court decided the case on that ground, which it may be said was the ratio decidendi in *Elwes* v. *Brigg Gas Co.* (2). That was the case of the pre-historic boat found buried in the land of the plaintiff which had been demised to a gas company, and Chitty J. held that it was as much the property of the freeholder as minerals would be, though no doubt he also held that the plaintiff was the first in possession after the original and presumably pre-historic owner.

I do not agree that the authority of *R.* v. *Rowe* (1) is in any way qualified by *R.* v. *White* (3) in the Court of Criminal Appeal. The conviction in that case was quashed simply on the ground that the summing up did not sufficiently explain the law of stealing by finding, now expressly defined in the Larceny Act, 1916. The fact is that the theft alleged was of golf balls from a golf course ; on every course balls must be lost from time to time, to be retrieved when the grass is cut or when someone has the time to look for them. Clearly there is no licence from the club to all and sundry to go on to the course and take what they can find, and the facts show that the club did mean to exclude these pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property. A simple illustration will show the fallacy of the appellant's contention : A, meaning to give his neighbour B, a present of game takes a brace of pheasants to the latter's house ; finding the door open he leaves them in the hall, and thereby abandons both his property in and possession of them. B, has at the moment gone out to post a letter, so does not know of A's gift. C, who has seen A's action, enters the house, before B returns, and steals the game. Can it be doubted that C is guilty of larceny and that the property can rightly be laid in B ?

Yes

Chy. n. R.

---

(1) 23 J. P. 117.
(2) 33 Ch. D. 562.
(3) 107 L. T. 528 ; 76 J. P. 384.

In the present case any difficulty might have been avoided by describing the balls, or at any rate seven of them, as the property of persons unknown, and at the present day allegations concerning the ownership of stolen property are, except in a few exceptional cases, treated as immaterial. In my opinion, the justices were right in convicting, and this appeal is dismissed.

HUMPHREYS J. In my opinion, the justices who stated this case have created a number of suggested difficulties which do not arise upon the simple facts of the case. I express no opinion upon the statement in the case: " We are agreed that " the golf balls in question were lost by the original owners in " such circumstances that they must be held to have been " abandoned," beyond saying that I find nothing in the facts of the case as stated to support such an inference, but I assume for the purpose of my judgment that the balls were abandoned by their original owners. The simple question in the case, as I see it, is this: Was there evidence to justify the conviction for theft of those balls by the appellant? That appears to me to be a totally different question from that elaborately argued by the justices in the course of stating the case, namely, " Would the members of the golf club have had a claim to the " balls when found, superior to that of an honest finder of them " while they lay upon the golf course?" The appellant was not an honest finder; indeed, he was not a " finder " at all, except in the sense in which a burglar may be said to " find " the jewellery upon the dressing-table of the householder, to steal which is the object of his entry upon the premises. It is found that the appellant was a trespasser who had been warned off the golf course and that he was aware that police were employed for the purpose of preventing unauthorized persons from picking up and taking away golf balls. It was further found that the appellant, after giving a false name and address and denying that he was in possession of any golf balls, had when found in possession of eight of them admitted that he knew he had no right to take them. He therefore, as the justices found, acted fraudulently, without any claim of right and with the intention of permanently depriving the owners of their property. In truth, he went there in order to steal the golf balls which he knew would be lying there and he stole as many as he could see. To describe such a person as having acquired any sort of property in the balls would be fantastic.

But it is said that the golf balls were not the subject of larceny because the members of the club had no property in them. Why not? The balls were on their land. They were believed to be there in some numbers, though the time had not arrived for searching for and retrieving them. The intention of the members to exercise control over the balls was proved by the steps taken by them to prevent other persons from interfering with them. In my opinion, this case is covered by the decision in the case of *R.* v. *Rowe* (1) referred to by my Lord. In such a case as the present it is not necessary to allege or prove who is in law the owner of the goods, indeed it is not essential to name any person as the owner of the goods in an indictment for larceny though it is the practice to do so: see r. 6, sub-r. 1 of the rules contained in the schedule to the Indictments Act, 1915. I agree that the appeal should be dismissed.

PRITCHARD J. I agree. In view of the finding of fact that the balls had been abandoned, the main question argued in this case was whether, before the appellant picked up the balls, the members of the club had acquired of them a possession of such a nature that interference with it was capable of becoming the basis of a charge of larceny. Before it can be said that the members did acquire such a possession of the balls, I think it must appear from the facts found that they intended to exclude others from interfering with the balls, and that they had over them a degree of power which was sufficient for the purpose of giving effect to such intent. In my judgment, on the facts found, it is clear that the members did so intend and had such power. It is true that there was no finding that they knew of the existence of these eight balls on their links, but I do not think that this absence of knowledge prevented the members having the necessary animus domini, which may be contained and I think was contained in a larger intent to exclude others from the place where in fact the balls were.

For these reasons I agree that the appellant was rightly convicted of larceny and that his appeal fails.

Appeal dismissed.

Solicitors for the appellant: *Sayer, Ledgard & Smith, for Smith, Fort & Symonds, Stockport.*

Solicitors for the respondent: *Gregory, Rowcliffe & Co., for Arthur Bond, Town Clerk, Stockport.*

---

(1) 23 J. P. 117.

C. G. M.

MINISTER OF PENSIONS *v.* HIGHAM.

1948
Apr. 15.

Denning J.

Pensions appeals—Stare decisis—Conflicting decisions of English and Scottish courts—" War risk injury "—Existence of abnormal conditions—Interpretation ejusdem generis—War Pensions (Naval Auxiliary Personnel) Scheme, 1946 (*St. R. & O.* 1946, *No.* 1640), *first schedule, para.* 2 (*d*)—*Pensions* (*Mercantile Marine*) *Act*, 1942 (5 & 6 *Geo.* 6, *c.* 26), *s.* 1 *sub-s.* 2.

The decisions of the Superior Courts in England, Scotland and Northern Ireland, though binding on the Pensions Appeals Tribunals, are not absolutely binding on the Superior Courts themselves. Where the decisions of these courts are conflicting, the later is to be preferred if it was reached after full consideration of the earlier.

A " war risk injury " is defined in the War Pensions (Naval Auxiliary Personnel) Scheme, 1946, sch. I, para. 2 as " a physical " injury sustained . . . . at sea or in any tidal water or in the " waters of any harbour and attributable to [certain causes specified " in sub-paras. (*a*), (*b*), (*c*) or] . . . . (*d*) the existence on board " ship of any other conditions arising out of . . . .war which " which would be abnormal in time of peace." Denning J. said in *Staynings* v. *Minister of Pensions* (1) that the cases covered by sub-para. (*d*) had to be ejusdem generis with the cases set out in sub-paras. (*a*)-(*c*); but subsequently the Court of Session in *Minister of Pensions* v. *Ballantyne* (2) disagreed with that interpretation and held that there was no reason for giving sub-para. (*d*) such a restricted meaning.

Held, that the court would follow the ruling of the Court of Session in *Minister of Pensions* v. *Ballantyne* (2) and would not restrict sub-para. (*d*) by application of the ejusdem generis rule. There were, however, several limitations contained in the definition of a " war risk injury," and that term was not so wide as to include any injury attributable to war service.

PENSIONS APPEAL.

The applicant was a canteen assistant employed by the Navy Army and Air Force Institute. He sustained injuries in his civilian work before the war and suffered from a bone disease which was aggravated by reason of the abnormally long hours and conditions of his service on board ship with the Institute. The tribunal found that the aggravation was in the nature of a " war risk injury " within the meaning of

---

(1) (1947) Chapman's War Pensions Appeals Reports, vol. 1, p. 319.

(2) (1948) Chapman's War Pensions Appeals Reports, vol. 2, p. 641.

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

1948

MINISTER OF PENSIONS v. HIGHAM.

the War Pensions (Naval Auxiliary Personnel) Scheme, 1946 (1), and that the applicant was entitled to a pension. The Minister appealed, in order that the position due to the difference of opinion between this court and the Court of Session as to the interpretation of the relevant statutory provisions might be clarified.

H. L. Parker for the Minister.

Crispin (for *Wellwood*) for the applicant.

DENNING J. The provision which has given rise to difficulty is the definition of " war risk injury " in the scheme which is in the same words as s. 1, sub-s. 2, of the Pensions (Mercantile Marine) Act, 1942. It provides that a war risk injury is a physical injury sustained at sea or in any other tidal water or in the waters of any harbour and attributable to certain specified conditions (*a*), (*b*), (*c*) or (*d*) " the existence on board ship of " any other conditions arising out of the war which would " be abnormal in times of peace." In *Staynings'* case (2) I said in an obiter dictum that " what is covered by para. (*d*)

---

(1) War Pensions (Naval Auxiliary Personnel) Scheme, 1946, sch. I, para. (2.) : " A war " risk injury is a physical injury " sustained on or after the third " day of September, 1939, at sea " or in any other tidal water or in " the waters of any harbour and " attributable to—

" (*a*) the taking of measures " with a view to avoiding, pre- " venting or hindering enemy action " against ships, or as a precaution " in anticipation of enemy action " against ships, or for rescue or " salvage purposes in consequence " of enemy action against ships ; " or (*b*) the absence, by reason of " circumstances connected with " any war in which His Majesty " may be engaged, of any aid to " navigation for ships, or of any " warning of danger to ships, " being an act or warning which " would be normal in time of " peace ; or (*c*) the carriage, by " reason of circumstances con- " nected with any such war as afore- " said, of any cargo in a manner " which would be abnormal in time " of peace and involves danger to " the ship in which the cargo is " carried or to her crew ; or (*d*) the " existence on board ship of " any other conditions arising " out of any such war as aforesaid " which would be abnormal in " time of peace :

" Provided that—

" (1.) in relation to injuries " sustained in the waters of a " harbour, the measures specified " in sub-para. (*a*) of this para- " graph do not include the pro- " hibition or restriction of lights " other than navigational lights ; " and (2.) in relation to a salvage " worker, or the master or member " of the crew of a salvage vessel, " the references in sub-para. (*a*) " of this paragraph to measures " taken for salvage purposes shall " not apply."

(2) (1947) Chapman's War Pensions Appeals Reports, vol. 1, p. 319.

"is something ejusdem generis with the preceding paragraphs, "such as alterations in the physical conditions existing on "board ship." In *Ballantyne's* case (1) the Court of Session said they were unable to agree with this dictum, and they saw no reason for giving para. (*d*) the restricted meaning.

This case therefore raises an important point as to the use of precedents in pensions cases. I desire to state, what I have said before, that the doctrine of stare decisis does not apply in its full rigour to this branch of the law. The decisions of the Superior Courts (The High Court in England, the Court of Session in Scotland and the Supreme Court in Northern Ireland) are binding on the Pensions Appeals Tribunals. They are not absolutely binding on the Superior Court itself or on the courts of co-ordinate jurisdiction but will be followed in the absence of strong reason to the contrary. But what is to be done when there is a decision of the Court of Session which is in conflict with a decision of this court or vice versa? The conflict cannot be resolved by an appeal to a higher tribunal because there is no provision for any such appeal, yet resolved it must be. I am told that when this court gave rulings on the law which were more in favour of the claimants than those of the Court of Session, some claimants would move from Scotland to England in order to come before the tribunals in this country; and the reverse has happened. When the Court of Session in *Ballantyne's* case (1) gave a ruling which was more in favour of the claimant than *Staynings'* case (2) in this court, one claimant took an accommodation address in Scotland in order to come before a tribunal there. Such a state of affairs must be remedied. I lay down for myself therefore the rule that, where the Court of Session have felt compelled to depart from a previous decision of this court, that is a strong reason for my reconsidering the matter: and if on reconsideration I am left in doubt of the correctness of my own decision, then I shall be prepared to follow the decision of the Court of Session, at any rate in those cases when it is in favour of the man, because he should be given the benefit of the doubt. In this respect I follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it is reached after full consideration of the earlier decision. I trust that, by the application of this principle, the few differences that have arisen between the Court of Session and this court will be solved.

---

(1) (1948) Chapman's War Pensions Appeals Reports, vol. 2, p. 641.

(2) (1947) Chapman's War Pensions Appeals Reports, vol. 1, p. 319.

Applying this principle I follow the ruling of the Court of Session in *Ballantyne's* case (1) and hold that para. (*d*) is not to be restricted by the application of the ejusdem generis rule. I would like to say, however, that I did not mean, by my observations in *Staynings'* case (2) to limit the application of para. (*d*) to physical conditions on board ship. It is plain that the conditions which existed in *Ballantyne's* case (1) namely, the necessity of keeping in convoy, the exposure to enemy attack, and the need to stand-by during attacks or threatened attacks created conditions on board ship which would be abnormal in time of peace, and I have so held in other cases. If those conditions involved the necessity of continuously working longer hours and in consequence a man suffered from a disease or the aggravation of a disease, then the injury would be a "war risk injury." If, however, the longer hours were not due to war-time conditions on board ship, but to other conditions which might happen equally in time of peace, as for instance to climatic or weather conditions, the injury would not be a "war risk injury" and that is all I meant to convey by my observations in *Staynings'* case (2).

It is important, however, to notice that the scope of "war risk injuries" is not so wide as to include any injury which is attributable to war service. There are several limitations contained in s. 1, sub-s. 2 of the Act of 1942, which make the position of naval auxiliary personnel and merchant seamen less favourable than that of naval men. One limitation is that the injury must be sustained "at sea or in any other tidal water or in the waters of any harbour." It is that limitation which deprived the coastguard of a pension in *Minister of Pensions* v. *Nugent* (3), and that limitation could have deprived Higham of a pension if the aggravation of his disease had been due not to his service afloat but to his standing on concrete floors ashore. Another limitation in (*d*) is that the abnormal conditions must exist "on board ship." The fact that the conditions are abnormal for the man personally is not sufficient. For instance, if a clerk is taken from his office and sent to be a canteen assistant in a ship the conditions for him personally

---

(1) (1948) Chapman's War Pensions Appeals Reports, vol. 2, p. 641.

(2) (1947) Chapman's War Pensions Appeals Reports, vol. 1, p. 319.

(3) 115 L. J. (K. B.) 208; [1946] W. N. 26.

1948

MINISTER OF PENSIONS *v.* HIGHAM.

Denning J.

would be abnormal compared to his work in time of peace and might aggravate an old-standing complaint, but if the conditions existing on board the ship were not abnormal for the ordinary canteen assistant the injury would not be a "war "risk injury." Another limitation is that, although the conditions on board ship may arise out of the war, they must also be "abnormal in time of peace." Thus, the presence of a ship in dock for repairs may be due to war damage, but if the conditions under which she is being repaired are in no way abnormal, accidents happening to men whilst she is in dock are not "war risk injuries" unless the war damage plays some intermediate part in them, see *Cook* v. *Minister of Pensions* (1). These limitations would have deprived Higham of his pension if the tribunal had accepted the commanding officer's evidence that during the whole of his service abroad the ship was refitting, with the majority of the ship's company on leave, and he was not subjected to any abnormal or severe condition arising out of the war. I have mentioned these limitations because I do not wish it to be supposed that I am holding that the tribunal came to a correct decision on the facts of this case or that its findings of fact were even sufficient to justify the decision. Counsel for the Minister does not invite me to go into that matter and I therefore say no more about it. All I say on the point raised before me is that the dictum in *Staynings'* case (2) does not go to the length suggested and this appeal is therefore dismissed.

Appeal dismissed.

Solicitors for the Minister: *The Treasury Solicitor.*
Solicitors for the applicant: *Neil Maclean & Co.*

(1) (1948) Chapman's War Pensions Appeals Reports, vol. 1, p. 1219.

(2) (1947) Chapman's War Pensions Appeals Reports, vol. 1, p. 319.

RACKETT *v.* ASTON & CO. LIMITED and CORNELIUS.

C. A.

1948 *May* 9, 10.

Scott and Asquith L.JJ. and Jenkins J.

Landlord and tenant—Application for new lease—Notice by sub-tenant of premises to his immediate landlord, the tenant, sent on by latter to the superior landlord—Offer by superior landlord of new lease not accepted by sub-tenant—Offer out of time—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4 *and* 5.

On May 10, 1946, the sub-tenant of premises served on his immediate landlord, the tenant, under s. 5, sub-s. 1 of the Landlord

RACKETT
v.
ASTON &
CO., LD.
AND
CORNELIUS.

and Tenant Act, 1939, notice of a claim for a new lease. On May 20, the tenant's solicitors gave notice of the claim to the superior landlord. On July 18 the superior landlord offered to the sub-tenant a new lease under the proviso (*b*) of s. 4 of the Act. The sub-tenant did not accept the offer but brought the present action under s. 5, sub-s. 1. The learned county court judge held that the offer of a new lease by the superior landlord was a counter notice under s. 4, proviso (*b*) and it not having been accepted by him the sub-tenant was disentitled from claiming compensation or a new lease. On appeal:—

Held, that the scheme of the Act was to deal with the relationship between the tenant and his landlord. Consequently the notice of willingness to grant a new lease, which under proviso (*b*) of s. 4 gave to the landlord the right to free himself from the obligation to pay compensation, must be a notice to the tenant from his immediate landlord, and it was that notice which must be within the limited period of two months from the notice of claim. The notice from the superior landlord was out of time and a nullity.

APPEAL from Worthing county court.

The applicant, Rackett, took a sub-lease of certain premises from the first respondent, Aston & Co., Ld., who held a lease from the second respondent Mr. Cornelius, the freeholder. The sub-tenancy was due to expire on May 8, 1949, one day before the lease of the mesne landlords also came to an end. On May 10, 1946, the sub-tenant served on his immediate landlord notice of a claim for a new lease, or, in the alternative, for compensation for loss of goodwill. On May 23, Messrs. Aston & Co.'s solicitors wrote to Mr. Cornelius, the superior landlord: "We send you herewith notice in duplicate under "the Landlord and Tenant Act. Kindly acknowledge receipt "on the duplicate copy sent herewith." On July 18 the superior landlord by his solicitor sent the following notice to the sub-tenant: "I hereby give you notice . . . . that in "lieu of such compensation he (Mr. Cornelius) is willing and "able to grant you a tenancy direct from him . . . . at the "rent of 120*l.* per annum for the term of seven years or at such "rent and for such terms not exceeding fourteen years as "failing agreement between us the tribunal may consider "reasonable." This offer was not accepted by the sub-tenant, who brought the present action under s. 5, claiming a new lease on the ground that such compensation as could be awarded him under s. 4 would not compensate him for the loss of goodwill he would suffer if he removed his business to other premises.

Deputy Judge Konstam, before whom the action came on

October 14, 1947, dismissed the claim on the ground that the serving by the superior landlord of a counter notice, offering a new lease, under proviso (*b*) of s. 4, disentitled the sub-tenant, who had not accepted the offer, to compensation for goodwill, and therefore, no compensation being recoverable, there could be no claim for a new lease under s. 5 (1).

The sub-tenant appealed.

---

(1) Landlord and Tenant Act, 1927. Section 4: "The tenant "of a holding to which this part "of this Act applies shall, if a "claim for the purpose is made in "the prescribed manner—(i) in "the case of a tenancy terminated "by notice within one month "after the service of the notice "on the tenant; and (ii) in any "other case, not more than "thirty-six nor less than twelve "months before the termination "of the tenancy; be entitled, at the "termination of the tenancy on "quitting the holding, to be paid "by his landlord compensation "for goodwill if he proves to the "satisfaction of the tribunal that "by reason of the carrying on by "him or his predecessors in title "at the premises of a trade or "business for a period of not less "than five years goodwill has "become attached to the premises "by reason whereof the premises "could be let at a higher rent "than they would have realized "had no such goodwill attached "thereto. Provided that—(*b*) the "tenant shall not be entitled to "compensation in respect of "such goodwill if within two "months after the making of the "claim the landlord serves on the "tenant notice that he is willing "and able to grant to the tenant, "or obtain the grant to him of a "renewal of the tenancy of the "premises at which the trade "or business is carried on at such "rent and for such term not "exceeding fourteen years as, "failing agreement, the tribunal "may consider reasonable; and "if the tenant does not within "one month from the service of "the notice send to the land-"lord an acceptance in writing of "the offer the tenant shall be "deemed to have declined the "offer."

Section 5 (1.): "Where the "tenant alleges that, though he "would be entitled to compen-"sation under the foregoing section, "the sum which could be awarded "to him under that section would "not compensate him for the loss "of goodwill he will suffer if he "removes to and carries on his "trade or business in other "premises, he may in lieu of "claiming such compensation, at "any time within the period "allowed for making a claim "under the said section, serve "on the landlord notice requiring "a new lease of the premises at "which the trade or business is "carried on to be granted to "him."

Section 8, sub-s. 1, second paragraph, provides that if copies of the sub-tenant's claim are served by the mesne landlord on the superior landlord the superior landlord shall have, in addition to the mesne landlord, the powers conferred by or in pursuance of this Part of this Act in like manner as if he were the immediate landlord of the occupying tenant . . . .

L. A. Blundell and *Curtis-Raleigh* for applicant. The learned judge has shut the applicant out from his right to a new lease under s. 5 of the Act on a preliminary technical question of law, viz., whether the serving by the superior landlord under s. 4, proviso (*b*) of a notice that he is willing to grant to the sub-tenant a new lease, and the sub-tenant has not accepted it, disentitles the sub-tenant to claim a new lease under s. 5. It is submitted that it does not. There is a distinction between a notice under s. 5 and a claim under s. 4. What may have been a proper notice under s. 5 may not be a claim within s. 4, because it is not a claim in the prescribed manner. It has been held that the two sections are not to be read together: see *Gough Garages* v. *Pugsley* (1). If by serving his notice on the intermediate landlord the applicant qualified himself for claiming under s. 5 and also for claiming under s. 4, then, assuming he has a claim under both sections, he has qualified himself under both sections. The statute looks to the substantial rights of the party and not to the proper observance of procedural steps. The learned judge appears to have assumed that the period of two months fixed by proviso (*b*) of s. 4 for the offering of a new lease dates from the day on which the superior landlord received the sub-tenant's notice. If that were correct then the offer of a new lease would be in time. It is submitted, however, that time runs from the date when the notice was given to the applicant's immediate landlord, and therefore the offer was out of time and is a nullity. There has been no trial of the merits of the case and the action should be remitted to the county court.

Anthony Harmsworth for respondents. The benefits provided by ss. 4 and 5 of the Act for tenants in the matter of compensation for goodwill are distinct, but the benefit under s. 5 is only to apply if the benefit under s. 4 is not sufficient. Originally the tenant in the present case made alternative claims of compensation or a new lease but subsequently he abandoned his claim for compensation under s. 4 and now brings his claim for the grant of a new lease. The Act is intended to do what may be called "rough justice between "tenant and landlord" but if the landlord's offer of a new lease under s. 4, proviso (*b*), is refused by the tenant, it would hardly be just to the landlord if his negotiations for a fresh letting were to be met by a claim by the tenant for a new lease under s. 5. Once the offer of a new lease has been made and refused then the right to compensation disappears and s. 5 is inapplicable, because there is no benefit or satisfaction to be recovered under that section. Proviso (*b*) is not procedural but substantive and s. 8, sub-s. 2, provides that the superior landlord is to have the same powers as the mesne landlord and it is submitted that that includes the same period of time for offering a new lease, and the offer in this case was in time.

---

(1) [1930] 1 K. B. 615.

SCOTT L.J. [his Lordship read the material sections of the Act of 1927 and having stated the facts continued :] In my view the counter notice given by the superior landlord was not a notice given within the time required by s. 4, sub.-s. 1.

The learned judge held that the notice from the superior landlord of July 18 was a notice which was within the Act. In my view it was too late. The scheme of the Act is quite clearly to deal with each relationship of landlord and tenant —between *that* tenant and *his* landlord—and for that reason, in my opinion, the notice of willingness to grant a new lease, which gives the landlord the right to free himself from the obligation to pay compensation, must be a notice from the tenant's immediate landlord to him ; and it is that notice which must be within the limited period of two months imposed by the second line of proviso (*b*). Whether a superior landlord might give a notice on behalf of himself and also on behalf of the mesne landlord is a question which it is not necessary to decide, because the right of the landlord to get out of his obligation to pay compensation is a right given to the landlord who is primarily liable to the tenant for compensation, i.e., the immediate landlord, whose lease the tenant holds, and nobody else ; and if the tenant who is claiming compensation does not get a notice within two months, proviso (*b*) has no application at all. . . . .

If that be the case, then the argument addressed to the court by Mr. Harmsworth that the tenant here lost his right to compensation, and therefore lost his right to a new lease under s. 5, sub-s. 1, falls to the ground. The first premise of that argument was that a right to a new lease is made by s. 5, sub-s. 1, absolutely conditional on a title to compensation under s. 4. He says, therefore, if s. 4 by the proviso (*b*) removes the right to compensation, it has gone for the purpose, also of s. 5. That is a perfectly just argument, but the point which was taken by the learned judge was a false point, for he assumed that the notice of the offer of a lease by the superior landlord was an offer by the landlord referred to in s. 4, sub-s. 1, proviso (*b*), in its first three lines: "the tenant shall not be "entitled to compensation in respect of such goodwill if within "two months after the making of the claim the landlord "serves on the tenant notice that he is willing." Whether the letter of July 18 could have been treated as a letter sent by the superior landlord on behalf also of the mesne landlord is immaterial. The point is that the date for making a counter-offer under that proviso passed when the two months from May 10 elapsed without one being made.

I only add this, that s. 8 seems to me definitely to bear out that interpretation of s. 4. In each case of a tier of landlords that section shows that the Act is aimed primarily at the relationship of tenant and landlord between each couple, and at nothing else. That is the interpretation I put on s. 4, sub-s. 1 (*b*). It was obviously on a procedural point that the learned judge based his judgment. He was wrong. The counter-offer was out of date, and the proceedings will have to continue therefore on the claim for a new lease made on May 10, 1946. That condition precedent to the right having failed, the whole question must be gone into as if no such offer had ever been made. The appeal will be allowed with costs here and below.

ASQUITH L.J. I agree. In order to claim a new lease under s. 5 the applicant has to show inter alia that he would be entitled to compensation under s. 4. It is said that in this case he would not be entitled to compensation under s. 4 because the provisions of s. 4, sub-s. 1 (*b*) apply and disentitle him to such compensation. It is said, in other words, that there was an offer of a new lease, and a rejection thereof, complying with the requirements of s. 4, sub-s. 1 (*b*). I agree with my Lord that there was no such offer complying with the time limits laid down in the proviso. I agree with him that the date of the making of the claim for the purposes of s. 4, sub-s. 1 (*b*), was May 10, 1946, and not later, the date when the applicant made his claim against his immediate landlord. The offer of the superior landlord was made more than two months after that, was out of time, and it, and its rejection, are accordingly a nullity, and, being a nullity, this offer and rejection cannot disentitle the applicant to compensation under s. 4. There is, accordingly, nothing in this transaction to disqualify him from claiming a new lease under s. 5. I agree that the appeal should be allowed.

JENKINS J. I also agree. Reading proviso (*b*) to sub-s. 1 of s. 4 of the Act in the light of the definition of " landlord " contained in s. 25 of the Act, but disregarding for the moment the provisions of s. 8, it is reasonably plain that the landlord for the purposes of proviso (*b*) is the immediate landlord, and he is given a period of two months after the making of the claim to serve notice offering a new lease. Thus, in this case, the person to give the notice would be the immediate landlord, that is Aston & Co. Ld., and they would have two months to serve that notice from May 10, 1946, when the occupying tenant made the claim for compensation. The meaning of the word " landlord " may be extended by virtue of the provisions of s. 8 so as to include a superior landlord, that is to say, in the present case Mr. Cornelius. Section 8 provides that where copies of claims and documents and so forth are served by the intermediate landlord on a superior landlord " the said superior " landlord shall have, in addition to the mesne landlord, the " powers conferred by or in pursuance of this Part of this Act " in like manner as if he were the immediate landlord." That, as my Lord has observed, may have the effect of entitling the superior landlord to serve a notice on behalf of himself and the intermediate landlord, but I can find nothing whatever in that part of the language of s. 8 to extend the time within which the superior landlord is allowed to serve that notice. The time seems to me to be fixed once and for all by proviso (*b*), which provides a period of two months from the making of the claim. There is nothing whatever in s. 8, so far as I can see, which would warrant the court in inferring a new period of time, running, I suppose, from the date when the superior landlord received the copies of the particular notice. For these reasons, in addition to those given by my Lord, I agree that the appeal should be allowed.

Appeal allowed.
Case remitted to county court.

Solicitors for applicant: *Petch & Co., for Bowles & Stevens, Worthing.*

Solicitors for respondent: *Carter & Barber, for V. H. O. Jackson, Littlehampton.*

A. W. G.

1948
May 4, 5.

Hallett J.

DENNANT *v.* SKINNER AND COLLOM.

Sale of goods—Sale at auction—Passing of property—Misrepresentations by purchaser as to his identity—Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *ss.* 18, 28, 39.

At an auction sale motor vehicles were sold to a man who was the highest bidder. During the sale, the purchaser made misrepresentations as to his identity to the auctioneer. Believing these misrepresentations the auctioneer allowed the purchaser to take delivery of the vehicles and accepted in payment a cheque accompanied by the purchaser's certificate to the effect that the property in the vehicles would not pass to him until his cheque had been honoured. The purchaser sold one of the motor vehicles to the third party who in turn sold it to the defendant. The purchaser's cheque was dishonoured. The auctioneer brought this action to recover from the defendant the motor vehicle or its value.

Held (1.) That this was not a case of larceny by a trick so as to prevent the property from passing to the purchaser; (2.) That the property so passed on the fall of the hammer and there was no effective condition that it should not so pass until the cheque had been honoured; (3.) That, the property having passed on the fall of the hammer, it was not possible for the purchaser, merely by signing such a certificate, to divest himself of the property and to revest it in the vendor.

The plaintiff, George Edward Kenneth Dennant, carried on business as the South London Motor Auctions, he being a certificated auctioneer. On November 8, 1946, he held an auction sale at which there were some thirty-five motor vehicles for sale and some one hundred and fifty people present as prospective buyers.

Amongst the vehicles dealt with at that sale was a Standard Saloon motor-car and that car was knocked down by the plaintiff to a man calling himself George Albert King who had bid 345*l.* for it and was the highest bidder. After the sale the plaintiff was induced by certain misrepresentations made to him by King to deliver the car to him in exchange for a cheque for 1,190*l.* which represented the price of the car in question together with the price of five other vehicles which had also been knocked down to King by the plaintiff at that sale.

Before allowing King to take delivery of the vehicles the plaintiff obtained his signature to a certificate in the following

[Reported by K. B. Campbell, Esq., Barrister-at-Law.]

terms : " I certify that my cheque No. 11B 287164 value 1,190*l*. " will be met on presentation to my Bank and furthermore " I agree that the ownership of the vehicles will not pass to " me until such time as the proceeds of my cheque have been " credited to South London Motor Auctions' account at " Lloyds Bank, Ld."

The cheque was dishonoured on presentation and King was later convicted of obtaining the six motor vehicles from the plaintiff by false pretences with intent to defraud. Subsequently the plaintiff discovered that the Standard motor car was in the possession of the defendant, Leslie Cecil Skinner, and the plaintiff, by his solicitor, demanded delivery up to him of the car. The defendant having refused, this action was started for the return of the car or its value.

The defendant, upon whose good faith in the matter there was no reflection, had in fact bought the car from one Collom, and upon that purchase there was admittedly an implied warranty of good title by virtue of the Sale of Goods Act, 1893. The defendant accordingly brought in Collom as a third party.

W. G. Wingate and *D. F. Brundrit* for the plaintiff.
F. Mattar and *P. Boydell* for the defendant.
H. G. Garland and *F. M. Landau* for the third party.
The arguments sufficiently appear from the judgment.

HALLETT J. Mr. Dennant having knocked this car down to the man King and subsequently delivered the car to King and allowed King to take it away, the onus is clearly upon him to establish to the satisfaction of the court that, notwithstanding what he did on November 8, 1946, he was still entitled to possession of this car at the time when he demanded such possession from the defendant, and he seeks to discharge that burden in two, or possibly three, ways. In the first place he says that the transaction which led to King having possession of the car amounted to larceny by a trick. King has been convicted of obtaining that car and five others by false pretences but, of course, the view that was taken in the criminal proceedings is not in any way binding upon me or even helpful to me for various reasons. King ultimately pleaded guilty, and in any case, as is pointed out in Archbold's Criminal Pleading, Evidence and Practice, any difficulty in distinguishing larceny by a trick on the one hand from obtaining by false pretences on the other, has now, for the purpose of criminal cases, become of little importance, because of the provision of s. 44 of the Larceny Act, 1916.

In this case, however, the distinction is of vital importance, and in some cases no doubt the distinction is difficult to draw. At p. 503 of Archbold it is suggested that the most intelligible distinction is as follows: "In larceny the owner of the thing "stolen has no intention to part with his property therein to "the person taking it, although he may intend to part with "the possession; in false pretences the owner does intend "to part with his property in the money or chattel, but it is "obtained from him by fraud."

Certain other tests have, however, been suggested. For instance in *Lake* v. *Simmons* (1), Lord Haldane in his speech cites the passage which was adopted by Fry J. in *Smith* v. *Wheatcroft* (2) and which reads as follows: "Does error in "regard to the person with whom I contract destroy the consent "and annul the agreement? I think that this question ought "to be decided by a distinction. Whenever the consideration "of the person with whom I am willing to contract enters as an "element into the contract which I am willing to make, "error with regard to the person destroys my consent and "consequently annuls the contract . . . . On the contrary, "when the consideration of the person with whom I thought "I was contracting does not enter at all into the contract, and "I should have been equally willing to make the contract with "any person whatever as with him with whom I thought I was "contracting, the contract ought to stand." Among the many passages I might select in this case, I select that one.

There is really no dispute about the facts of this case. Apart from one witness from Kings' Motors of Oxford who, I hasten to emphasize, was no relation at all of George Albert King to whom I have previously referred, the only witness was the plaintiff, Mr. Dennant, who was a completely candid and frank witness and I want to say without the slightest hesitation that I accept every word he said as being absolutely true.

There was no catalogue of this auction but certain printed terms or conditions of sale are said to be exhibited in the auction room and I have been furnished with a copy of that document. I feel considerable doubt as to how far it is satisfactorily proved that those conditions of sale were brought to the notice of the bidders so as to render it right to incorporate them in the contract of sale, but I do not propose to allow that doubt to influence me in my decision which proceeds upon other grounds.

---

(1) [1927] A. C. 487, 501.

(2) (1878) 9 Ch. D. 223, 230.

Whilst the sale was going on Mr. Dennant offered for sale a vehicle called a Commer van. The man who made the highest bid for the van was this man George Albert King. Mr. Dennant had never seen him before and did not know in the least who he was. He was simply a man there who had made the highest bid. "Then," said Mr. Dennant, "I sold "the van to him. When I knocked it down I asked his name." Now it is agreed by Mr. Brundrit and Mr. Wingate that upon a sale by auction a contract is completed on the fall of the hammer, and it is agreed also that prima facie the property in the lot knocked down then passes to the bidder. In so far as the printed conditions have any relevance at all, it is to be observed that cond. 3 provides that on the fall of the hammer the lot, with all errors of description, is to be at the risk and cost of the buyer. Up to that time Mr. Dennant had not inquired the name of the bidder. He had not concerned himself in any way with the identity of the bidder: he had knocked down that Commer van to that man who had bid whatever the top bid was, irrespective of the identity of that particular man. Then after he had knocked it down, as is usual at auctions, he asked the name of this man, and this man then said his name was King, and he was from Kings' Motors of Oxford, and in fact the son of the proprietor of that firm. Now Kings' Motors of Oxford are and were known to Mr. Dennant as a well-known and highly reputable firm in the motor vehicle trade, and Mr. Dennant accepted the statements thus made by George Albert King. It may be convenient to say at once that they were untrue. Mr. King, the real head of that reputable firm, has been called before me, and it turns out that George Albert King has no connexion with the well-known firm and is not in fact Mr. King's son.

After that Mr. Dennant knocked down five more vehicles to George Albert King, including the Standard motor car with which I am concerned, and when the sale was over King went to Mr. Dennant's office, again in the usual way, to arrange for payment and removal. Now at this time, subject to the second aspect of the matter which I shall discuss presently, the property in the Standard car to my mind had passed to King. The contract of sale had been made with King, and there seems to me to be no ground whatsoever upon which I could

1948

DENNANT
v.
SKINNER
AND
COLLOM.

Hallett J.

properly hold that the consideration of the person with whom Mr. Dennant was willing to contract entered as an element in the contract which Mr. Dennant was willing to make. At an auction sale, apart from any question of the reserve price, the lot is knocked down to the highest bidder, whoever he may be. When it comes to the question whether he shall be allowed to remove the lot without paying cash for it other questions arise, but as far as the contract is concerned, and the passing of the property in the object sold, the identity of the buyer does not usually enter into the question. I do not think it enters into the question any more than it ordinarily does on the sale of an article in a retail shop. In normal times a shopkeeper is not usually concerned with the identity of the customer when deciding whether he is willing to sell his goods to him, although he may be concerned with that matter when deciding whether, having effected the sale, he should give the purchaser credit.

When King went to Mr. Dennant's office, Mr. Dennant asked him how he meant to pay, and King replied that he would like to pay by cheque, to which Mr. Dennant rejoined that it was not his normal practice to accept cheques from people he did not know. King who appeared to be in possession of trade plates, which would suggest he was in the business, and had some drivers there to drive away the cars, repeated that he was of Kings' of Oxford, was running the Portsmouth branch, and that he was the son of the proprietor, and he showed Mr. Dennant the counterfoils in his cheque book, according to which he had been paying away large amounts to other well-known auctioneers, whereupon Mr. Dennant believed those representations and accepted from King a cheque for 1,190*l.*

Now I read two sentences from Mr. Dennant's evidence, which, as I regard them, seem to be crucial: "When I took the "cheque from King I believed him to be Kings' of Oxford; "if I had not so believed, I should not have accepted the "cheque." There is no evidence there that Mr. Dennant was induced to sell the car to King in the belief that King was connected in the manner which he had described with this highly reputable firm. That seems to have been entirely immaterial from the point of view of selling the car. The Commer van had been sold before King's identity was mentioned at all, and the mention of his identity was only made in the ordinary way, as I interpret the evidence, for the purpose of Mr. Dennant completing the auctioneer's memorandum. The effect which the misrepresentation had upon Mr. Dennant's mind was to induce him to accept the cheque instead of requiring cash to be paid before the vehicle was delivered. The conditions again, if they are of any relevance, which I doubt, say that the entire purchase money is to be paid before the lots are removed on the day of the sale, and then conds. 10 and 11 deal with cheques being tendered in payment, it being stated that "Cheques tendered in payment will not be accepted "unless satisfactory references are given." When Mr. Dennant, persuaded by those lies, consented to take the cheque for 1,190*l.*, he procured the signature by this man King to a form which is before me: "I certify that my cheque No. 11B "287164 value 1,190*l.* will be met on presentation to my Bank "and furthermore I agree that the ownership of the vehicles "will not pass to me until such time as the proceeds of my "cheque have been credited to South London Motor Auctions' "account at Lloyds Bank, Ld."

I have now covered all I need to say about the facts, and I can express my judgment at once upon the first point, namely, whether this transaction by which this car passed into the possession of King amounted to larceny by a trick. To my mind the case of *Phillips* v. *Brooks, Ld.* (1) is in principle indistinguishable, and so far as I am aware, the correctness of that decision has never been judicially questioned. There have, of course, been many cases since then where questions as to the distinction between larceny by a trick and obtaining by false pretences have been considered, but my attention has not been called to any case which is as much in point as the case of *Phillips* v. *Brooks, Ld.* (1).

I have said that the correctness of the decision of *Phillips* v. *Brooks, Ld.* (1) has not been judicially questioned so far as I know. The case was mentioned in *Lake* v. *Simmons* (2), and in his speech at p. 501, immediately after the passage of Fry J. which I have already quoted, Lord Haldane deals with *Phillips* v. *Brooks, Ld.* (1) and I can see nothing there to suggest that Lord Haldane doubted the correctness of the earlier decision. Mr. Brundrit and Mr. Wingate, however, have drawn my attention to what is said in the well-known textbook, Anson on the Law of Contracts. In the seventeenth edition published in 1929 given to me in the first instance, at pp. 158 and 159, the learned authors of that edition, Sir John Miles and Professor Brierley, deal with *Phillips* v. *Brooks, Ld.* (1), and in a footnote say: "This case does not appear

(1) [1919] 2 K. B. 243.

(2) [1927] A. C. 487.

"to be affected by the decision in *Lake* v. *Simmons* (1), for in "that case when the jeweller handed the goods to the swindler "he did so merely to enable her to show them to a supposed "intending purchaser. He intended to make her his bailee, "and not to enter into a contract of sale with her." I respectfully agree with that note. But in the nineteenth edition of the same work, published in 1945, where Professor Brierley is the sole editor, at p. 158 he appears to have taken a different view about *Phillips* v. *Brooks, Ld.* (2). I need not read what he says, but he clearly suggests that *Phillips* v. *Brooks, Ld.* (2) is a wrong decision, and that Lord Haldane in *Lake* v. *Simmons* (1) came to a right decision on the wrong grounds. Of course, I am not bound in any way by the opinion of the text-book writers, however eminent they may be, and, indeed, I prefer to decide this case not upon authority so much as upon principle.

I think if one looks at some of the cases upon which the plaintiff here might seek to rely, the distinction between them and the present case is obvious. For instance, in *Heap* v. *Motorists' Advisory Agency, Ld.* (3), the plaintiff never gave any real consent to the fraudulent person having or passing the property in the motor car in question at all. The car was put into the possession of the fraudulent person and Lush J. had to consider, as I have to consider, the difference between larceny by a trick and obtaining goods by false pretences. At p. 583 I think my brother Lush came to the gist of the whole matter in three sentences: "It is said by counsel for the "defendants that it is a case of obtaining a car by false pre- "tences, and not by larceny by a trick. In order to make that "out he has to establish that the plaintiff intended to part with "the property in the car to North. If he can establish that "then he is right, but if he cannot he is wrong." The learned judge held on the facts of that case that the plaintiff never intended to part with the property in the car to North, but merely intended to let North have the custody of the car in order that he might drive it to Uxbridge, show it to the entirely imaginary person named Hargreaves, and if possible sell it to Hargreaves for 210*l*. There never was a Hargreaves. There was no question of passing the property, according to the intention of the plaintiff, to a person called Hargreaves who just did not exist, and to whom the car was going to be shown by the fraudulent person North. Such a case seems to me to be very easy to explain.

---

(1) [1927] A. C. 487.
(2) [1919] 2 K. B. 243.
(3) [1923] 1 K. B. 577.

There are two more cases I will mention in passing. They are *Folkes* v. *King* (1) and *London Jewellers, Ld.* v. *Attenborough* (2). To my mind, whilst those cases deal with other points which do not arise here, upon the essential points they seem to me to indicate where I should be if I relied solely on *Phillips* v. *Brooks, Ld.* (3). In *London Jewellers, Ld.* v. *Attenborough* (2) Scrutton L.J. refers to *Phillips* v. *Brooks, Ld.* (3), but without expressing any opinion about the decision and saying merely that the point as to what is the effect of the statement between the parties may have to be considered at some future time. In the present case I am of the opinion, upon the evidence, that (there was no mistake as to the contracting parties at the time the contract of sale was made; in this sense, that there was no mistake affecting Mr. Dennant's assent to the sale and the passing of the property.) Accordingly the plaintiff's case, as far as it depends on the contention that this was larceny by a trick, in my judgment fails.

I come now to consider the second point on which the plaintiff relies, which I understand is this; that the property in the circumstances of this case did not pass until the price was paid by the cheque being in order or cash substituted for it. The circumstances in regard to that I have already stated, and it remains only to consider the law. In the first place, as I have said, I think that a contract of sale is concluded at an auction sale on the fall of the hammer. The Sale of Goods Act, 1893, s. 18, r. 1, provides: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." Accordingly, upon the fall of the hammer the property of this car passed to King unless that prima facie rule is excluded from applying because of a different intention appearing or because there was some condition in the contract which prevented the rule from applying. In my view, this was clearly an unconditional contract of sale, and I can see nothing whatever to make a different intention appear. The only evidence upon which it was ever suggested to exist was the printed conditions, but I can see nothing in those conditions

---

(1) [1923] 1 K. B. 282.

(2) [1934] 2 K. B. 206, 217.

(3) [1919] 2 K. B. 243.

1948

DENNANT
v.
SKINNER
AND
COLLOM.

Hallett J.

to negative an intention that the property should pass on the fall of the hammer. I think the conditions are entirely consistent with such an intention: By the Sale of Goods Act, s. 28 : " Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," and finally, by yet another section of the Act, namely, s. 39 (1.) (*a*), an unpaid seller of goods has a lien on the goods or right to retain them for the price while he is in possession of them, and he also has a right of re-sale as limited by the Act. Passing of the property and right to possession are two different things : here the property had passed upon the fall of the hammer, but still Mr. Dennant had a right to retain possession of the goods until payment was made. If, when he was ready to deliver the goods, payment was not made, he could have sued for the price, or he could have exercised powers of re-sale, and he could have secured himself by way of lien on the goods for the price, but once he chose, for reasons good, bad, or indifferent as a result of statements fraudulent or honest, to part with the possession of the vehicle by giving delivery of it, he then lost his seller's lien and no longer had a right to possession of the vehicle.

In my view, therefore, the second contention for the plaintiff also fails. However, there was a third aspect of the matter and that arises out of the document which I have already read. Now the document in its terms contemplates that the ownership of the vehicle has not passed to the bidder, but, as I have already said, in my judgment it had passed upon the fall of the hammer, and if subsequently the bidder executed the document acknowledging that ownership of the vehicle would not pass to him, that could not have any effect on what had already taken place. Can it be said that this document and the transaction it records as regards payment had the effect of divesting the property from King and re-vesting it in Mr. Dennant, the seller ? That is the only way in which Mr. Brundrit has been able to suggest it that the document assists the plaintiff. I have considered that aspect of the matter, but I do not think that such a view of the document is sound. In my view the property had passed on the fall of the hammer ; the right to possession had passed when Mr. Dennant, persuaded and misled by King's lies, parted with his seller's lien, and there was nothing left upon which Mr. Dennant could found a claim in detinue against some third person, in this case Mr. Skinner, who was thus in possession of the vehicle.

1948

DENNANT v. SKINNER AND COLLOM.

Hallett J.

The result seems to me to be that here the sufferer from the lies of King and from the reliance which Mr. Dennant unfortunately placed on him must be Mr. Dennant himself and not the innocent parties who are represented by the defendant and the third party in this action. Accordingly there must be judgment for the defendant and the third party.

Judgment for the defendant and for the third party.

Solicitors for the plaintiff: *W. F. Hollands & Son.*
Solicitors for the defendant: *Amery-Parkes & Co.*
Solicitors for the third party: *Simon, Haynes, Barlas & Cassels.*

REX *v.* ABERG.

C. C. A.

1948 *Mar.* 2.

Lord Goddard C.J., Humphreys and Hallett JJ.

Criminal law — Misdirection — Good character — Misprision of felony —Concealment for benefit.

Where the good character of the defendant is common ground it is unnecessary for the judge to refer to that good character in his summing up, and his failure to do so does not constitute a misdirection.

R. v. *Bliss Hill* (1918) 13 Cr. App. Rep. 125 explained.

Quaere whether on a charge of misprision of felony it is necessary for the prosecution to prove a concealment for the defendant's benefit.

APPLICATION for leave to appeal against conviction.

The applicant was a state-registered nurse who had a house in Hampstead where she carried on a nursing agency. In November, 1946, a man was brought to her house by a Pole and introduced to her by the name of Canning. He became a visitor there and subsequently lived there from March until November, 1947, posing as a doctor. In fact his real name was Alick Canning Kostanda. He had been sentenced at the Central Criminal Court on July 2, 1946, to four years' penal servitude, but he had escaped from Wormwood Scrubs prison in November, 1946.

By being at large while a sentence of penal servitude passed on him remained in force and had not expired Kostanda was committing a felony under s. 22 of the Transportation Act, 1824, as applied by s. 3 of the Penal Servitude Act, 1857.

The applicant was charged (1.) with aiding and abetting the commission of that felony (2.) with being an accessary after the fact to it by receiving, comforting and assisting Kostanda and (3.) with misprision of felony, in that she, knowing that Kostanda was unlawfully at large, unlawfully concealed the commission of that felony.

Evidence was given by the prosecution: (*a*) that Kostanda was described as a dangerous criminal on placards exhibiting his photograph which were published by the police and were posted at a police station within a hundred yards of the applicant's house (*b*) that the police called at the applicant's house in January, 1947, with that photograph but that the applicant denied knowledge of him (*c*) that the police called again at her house in November, 1947, and arrested Kostanda, and that the applicant was then most unco-operative and (*d*) that Kostanda had occupied a room in the semi-basement of her house which was in a filthy condition, and that a black bag and a hypodermic syringe, but no other medical instruments, were found in it.

The applicant's defence was that she did not know that Kostanda was an escaped convict, but that she thought he was a doctor in the Indian Medical Service. She gave evidence that she suffered from asthma and wanted occasional injections to give her relief from asthmatic spasms, and that it was convenient to have a doctor in the house who could give her such injections.

The evidence was that the applicant had hitherto borne a good character, but the judge did not mention that evidence in his summing up.

The applicant was found guilty on all three counts of the indictment and was sentenced to eighteen months' imprisonment on the first two counts and to six months' imprisonment on the third count (misprision of felony), the three sentences to run concurrently.

The applicant applied for leave to appeal against her conviction on all three counts on the ground (inter alia) that the judge had omitted to direct the jury that, if they entertained any doubt as to the guilt of the applicant, they might properly take her good character into consideration as an essential ingredient to be considered by them together with the other facts and circumstances of the case.

Halpern for the applicant. The failure of the judge to mention the applicant's good character in his summing up was a misdirection. It was implicit in Darling J.'s judgment in *Rex* v. *Bliss Hill* (1) that where the accused puts his character in issue, and the judge does not properly direct the jury on the matter, that is a misdirection. A fortiori a summing up which does not mention the good character of the accused cannot be supported.

LORD GODDARD C.J. delivered the judgment of the court. It is not necessary for me to go in detail through this case because Mr. Halpern has admitted that there was evidence upon which the jury could come to the conclusion that the defendant was guilty. But he cited the authority of *Rex* v. *Bliss Hill* (1), and complained that the judge, in a very long and detailed summing up, did not emphasize the defendant's good character. No one can read this summing up without seeing that, on the whole, it was favourable to the defendant, in the sense that the judge stressed all the points in her favour, and gave the jury an ample opportunity, if they saw fit, of accepting her version of the story and acquitting her. If it is said that it is misdirection on the part of a judge. especially when a defendant is defended by counsel, not to lay stress on the defendant's good character, I do not agree, and I do not think the case of *Rex* v. *Bliss Hill* (1) is any authority to the contrary. That was a case in which the judge did comment on the good character of the defendant, and it was said that he had not done so in a proper way. But that is a different thing from saying that the fact that the judge omits to refer to the good character of the defendant is a ground for saying that he has misdirected the jury and for quashing the conviction in every case. In this case there was no necessity to mention character because the case was fought on the ground that this woman, up to this time, was a woman of blameless character, carrying on a business closely inspected by officers of the London County Council, and that she had been carrying on that business without any complaint for a long time. No one ever suggested the contrary; the whole case went upon that line. Consequently, there is no ground here for saying there

---

(1) (1918) 13 Cr. App. Rep. 125.

C. C. A.
1948
Rex
v.
Aberg.

was any misdirection at all, and, it being admitted that there was evidence to go to the jury, this court cannot interfere.

There is one further point that has not been mentioned in argument, but to which the court thinks that it is desirable to refer. The third count was a count for misprision of felony. The jury found the defendant guilty on that count as well as on the other two counts. Misprision of felony is an offence which is described in the books, but it is an offence which has been generally regarded nowadays as obsolete or fallen into desuetude Although from a note in Archbold's Criminal Pleading, 31st ed., at p. 1446, it seems there have been recent cases at the Central Criminal Court in which counts for misprision of felony have been preferred, I desire to say that if in any subsequent case it is thought necessary to put in a count for misprision of felony, it would be desirable that great care should be taken to see what, according to more modern authorities, are the constituents of that offence. I call particular attention to the speech of Lord Westbury in the case of *Williams* v. *Bayley* (1). If this count appears in any subsequent indictments, or if it is made a substantive charge against a prisoner, it may be that this court will have carefully to consider what are the real constituents of that offence and whether it is necessary to prove, not assume, a concealment for the benefit of the defendant charged. However, no point of that sort is taken in this case and it is not necessary to go further into it because the sentence that was passed on the misprision count was merely concurrent with and less than the others, and there cannot, therefore, be any prejudice to the defendant. The consequence is that this application fails.

Application refused.

Solicitors for applicant: *Wontner & Sons.*

R. P. C.

---

(1) (1866) L. R. 1 H. L. 200, 220.

WALFORD v. NARIN.

1948
Apr. 26.
Morris J.

Sale of goods—Of the value of 10l. or upwards—Note or memorandum in writing, signed by the defendant—Sufficiency of—Name of plaintiff incorporated from subsequent solicitor's letter—Term of contract, seller to deliver to address designated by buyer—Not included in memorandum—Sale of Goods Act, 1893 (56 *&* 57 *Vict., c.* 7), *s.* 4, *sub-s.* 1, *s.* 29, *sub-s.* 1.

1948

WALFORD
v.
NARIN.

Where on a contract for the sale of goods of the value of ten pounds or upwards, the parties expressly agree that the goods shall be delivered by the seller to the buyer at a place to be designated by the buyer (thus negativing the provision in s. 29, sub-s. 1, of the Sale of Goods Act, 1893, that, in the absence of an agreement as to delivery, express or implied, the place of delivery is the seller's place of business, if he have one, and, if not, his residence), the express agreement as to delivery is a term of the contract which must be contained in the note or memorandum in writing thereof required by s. 4, sub-s. 1 of that Act.

Wilkinson v. *Evans* (1866) L. R. 1 C. P. 407, distinguished.

ACTION.

The plaintiff, Mr. A. H. Walford, advertised in the press certain secondhand furniture for sale at his house, Lea Lodge, East Finchley. The defendant, Mr. S. Narin, went to see the furniture and orally agreed on January 20, 1948, to purchase it for 150*l.*, the plaintiff agreeing to send the furniture to a factory with which he was connected, where one piece—a dressing table—would be sprayed and the plaintiff agreed that subsequently he would deliver the furniture to the defendant at such place as the defendant designated. The defendant then signed the following document dated January 20, 1948, written on the plaintiff's notepaper with the plaintiff's address crossed out and the defendant's address substituted. It ran: " I agree to purchase the following second hand furniture and " will forward a cheque for 150*l.* in payment for same within " three days." Then the articles of furniture were set out. The plaintiff retained the document and, a few days later, had it stamped.

On January 21 the defendant telephoned the plaintiff saying that he no longer desired to take delivery of the furniture. On the same date the plaintiff's solicitors wrote to the defendant " We have been consulted by Mr. A. H. Walford " . . . . " We understand from our client that you purchased from him " furniture for the sum of 150*l.* last night and we have before " us a memorandum of the bargain which you signed. " Mr. Walford informs us that you telephoned him this " morning to state that you no longer desired to take delivery " of this furniture. Our client was most surprised and has " instructed us to write to you accordingly. We must inform " you, therefore, that the furniture stands at your risk and " that unless we receive payment for the same by the 23rd " inst., the date you promised in the memorandum, we shall " issue a writ against you." The defendant's solicitors replied on January 22: "Your letter of yesterday's date "addressed to Mr. S. Narin has been handed to us with "instructions to deal with the same on his behalf. He informs "us that he has no copy of the memorandum signed by him, "and we shall, therefore, be obliged if you will favour us with "a copy of same and give us an opportunity of inspection of "the original. After we have seen these we will take our "client's instructions and communicate with you again." Several other letters passed between the solicitors and on January 28 the defendant wrote himself to the plaintiff: "The capital with which I intended to purchase the furniture "was a loan which was promised me by a close relative. Now, "for some reason best known to himself, he has withdrawn his "promise which leaves me in an awful position, I must admit. "Under the circumstances I feel sure you will agree with me, "it would seem rather futile and hopeless to bind myself, "when I am incapable of discharging my obligations. My "reason for telephoning you on the following morning was the "hope that you would be able to dispose of the furniture in "question."

The plaintiff sued for 150*l.* the price payable by the defendant to the plaintiff under the contract for the sale of goods. By affidavit the defendant swore that, "the money, the subject "matter of the plaintiff's claim herein is the price alleged to be "due to him in respect of the sale to me by the plaintiff of certain articles of furniture. I am advised and verily believe "that the said alleged contract of sale is unenforceable, in that "there is no sufficient note or memorandum in writing of the "said contract, as required by law, and I have not accepted "or received the goods, neither have I given anything in earnest "to bind the contract." At the trial it was contended for the defendant that there was no sufficient note or memorandum in writing of the contract within the meaning of s. 4, sub-s. 1, of the Sale of Goods Act, 1893 (1), in that (*a*) the name of the

(1) Sale of Goods Act, 1893, s. 4—"(1.) Contract of sale for "10*l.* and upwards—A contract "for the sale of any goods of the "value of ten pounds or upwards "shall not be enforceable by action "unless the buyer shall accept "part of the goods so sold, and "actually receive the same, or "give something in earnest to "bind the contract, or in part "payment, or unless some note "or memorandum in writing of "the contract be made and signed "by the party to be charged or "his agent in that behalf."

Section 29—(1.) "Rules as to "delivery—Whether it is for the "buyer to take possession of the "goods as for the seller to send

1948

WALFORD
v.
NARIN.

plaintiff did not appear on the document signed by the defendant on January 20 and (*b*) that this document did not contain a term of the contract between the parties that the plaintiff should deliver the goods to the defendant to an address which he, the defendant, would specify.

Pearl and *Wellwood* for the defendant. The document of January 20, 1948, signed by the defendant, did not contain the name of the vendor. Parol evidence cannot be admitted to connect two or more writings, to constitute a sufficient note or memorandum, signed by the defendant, within the meaning of s. 4, sub-s. 1, of the Sale of Goods Act, 1893. *Boydell* v. *Drummond* (1). A solicitor has no general authority to sign a memorandum for his client and a solicitor instructed to deny a contract with which his client is charged is not authorized to make a memorandum. See Halsbury's Laws of England (2nd ed.), vol. 7, at pp. 127–8 and the cases there cited and *Thirkell* v. *Cambi* (2). The plaintiff has to show that his solicitor was authorized to sign the memorandum on his behalf and he has not done so.

It was a term of the contract between the plaintiff and the defendant that after the furniture purchased by the defendant had been sent to a factory with which the plaintiff was connected, for one of the pieces of furniture to be sprayed, the furniture bought should be delivered by the plaintiff, at his expense, to the defendant at an address to be designated by the defendant. This term is not to be found in the document of January 20 signed by the defendant, nor in any of the letters which passed between the parties or between their respective solicitors. In *Thirkell* v. *Cambi* (2) Bankes L.J. said (3): "The first question raised was whether these letters "do contain terms agreed upon or whether they show that "there were terms which never were agreed upon. Take for "example the terms as to the mode of delivery and the "conditions of payment." And Scrutton L.J. said (4): "But when all these documents are examined, which, it is said, "contain the terms of the contract and prove that there was

---

"them to the buyer is a question "depending in each case on the "contract, express or implied, "between the parties. Apart from "any such contract, express or "implied, the place of delivery is "the seller's place of business, "if he have one, and, if not, his "residence . . . ."

(1) (1809) 11 East. 142.

(2) [1919] 2 K. B. 590.

(3) Ibid. 593.

(4) Ibid. 598.

"no other contract, it is found that one term, the mode of "delivery of the goods against payment, is not mentioned in "the written statements of the contract."

C. H. Duveen for the plaintiff. The letter of January 28 written by the defendant to the plaintiff sufficiently refers to the agreement which was made between the two parties so as to introduce the name of the plaintiff. That document, therefore, together with the document of January 20 constitutes the note or memorandum sufficient to satisfy the statute. *Long* v. *Millar* (1), *Studds* v. *Watson* (2) and *Stokes* v. *Whicher* (3). The letter written by the defendant's solicitors to the plaintiff's solicitors on January 22 has the same effect.

On the facts it is contended that there was no specific arrangement about the delivery of the furniture and that, therefore, the parties must consult s. 29, sub-s. 1, of the Sale of Goods Act, 1893, for the law applicable. But if there were an arrangement between the parties that the plaintiff should deliver the furniture to the defendant at a place to be designated by him, that is only a provision for the performance of the contract which has been made. In Leake on Contracts (8th ed.) the present editor writes at p. 191: "directions "respecting the route by which goods are to be delivered relate "to the mode of performance, and not to the substance of the "contract, and, therefore, need not be in writing." See Erle C.J. in *Wilkinson* v. *Evans* (4) and *Leather Cloth Co.* v. *Hieronimus* (5). The arrangement was one as to the performance of the contract stating how it was to be carried out and not a term of the contract itself. Payment here was to be made three days after the date of the contract: delivery of the goods was to be made long afterwards. In *Thirkell* v. *Cambi* (6) the provision for payment and for delivery were closely related and therefore that case can be distinguished. The provision for delivery in the present case was not an essential part of the contract but a term only relating to the mode of its performance, not to its substance.

MORRIS J. A number of decisions have been cited dealing with the question of the authority that should be possessed by an agent who signs a memorandum sufficient to satisfy a statutory requirement, as, for example, the requirement of

---

(1) (1879) 4 C. P. D. 450.
(2) (1884) 28 Ch. D. 305.
(3) [1920] 1 Ch. 411.
(4) (1866) L. R. 1 C. P. 407, 410.
(5) (1875) L. R. 10 Q. B. 140.
(6) [1919] 2 K. B. 590.

1948

WALFORD
v.
NARIN.

Morris J.

s. 4 of the Sale of Goods Act, 1893. It does not seem to me that the citation of decisions is necessary in regard to this part of the case. The words in the second paragraph of the letter of the defendant's solicitors dated January 22, 1948, are, in my judgment, quite plain, namely, the words, " He informs " us that he has no copy of the memorandum signed by him." There cannot be any doubt that the solicitors were correctly stating that they were informed by the defendant that he had no copy of a memorandum signed by him and those words, in my judgment, carry the plain meaning that the solicitors, having been asked by the defendant to deal with the letter that he had received from the plaintiff's solicitors, wrote on the direct instruction of the defendant to say that the defendant had no copy of the memorandum signed by him. That is a clear statement by somebody told to write on behalf of the defendant, that the defendant is saying: I did sign the memorandum to which you are referring, but I have not a copy of it. The letter asks for a copy. In my judgment, that letter is quite sufficient by itself to supply one deficiency in the document of January 20, namely, the deficiency that the name of the plaintiff is not contained in that document. Mr. Duveen for the plaintiff citing *Studds* v. *Watson* (1) contends that the letter of January 28, from the defendant to the plaintiff sufficiently refers to the agreement that was made between the defendant and the plaintiff so as to introduce the name of the plaintiff and that he could rely upon that letter together with the memorandum of January 20, as together constituting a sufficient note or memorandum in writing. In view of what I have held in regard to the letter of January 22nd it is unnecessary for me to deal with this alternative contention, advanced by Mr. Duveen. If the matter had rested there I would clearly be of opinion that the documents constituted a sufficient note or memorandum in writing. (His Lordship read s. 4, sub-s. 1, of the Sale of Goods Act, 1893, supra, and said): There is no dispute between the parties that the contract is unenforceable unless there is a note or memorandum in writing of it, signed by the defendant. (His Lordship then read s. 29, sub-s. 1, of the Sale of Goods Act, 1893, supra, and proceeded): Mr. Duveen has submitted that on the evidence in this case the proper conclusion is that nothing was arranged between the parties as to delivery and that therefore the result is that in accordance with s. 29, sub-s. 1, delivery was to be at the residence of the plaintiff. On the facts I have already stated my conclusion, that it was arranged between the plaintiff and the defendant that the plaintiff was to deliver to the defendant. That was a term of the contract that depended upon the particular arrangement made between the parties. Mr. Duveen further argued that if, contrary to his submission, I held, that there was agreement between the plaintiff and the defendant that the plaintiff should deliver to the defendant, nevertheless such an agreement need not be incorporated in the note or memorandum in writing. In support of that contention he referred to Leake on Contracts (8th ed.), at p. 191, and to the sentence reading: " But directions respecting the " route by which the goods are to be delivered relate to the mode " of performance and not to the substance of the contract, and " therefore need not be in writing." The authority given to support those words is that of *Wilkinson* v. *Evans* (1) together with one other case, but when *Wilkinson* v. *Evans* (1) is looked at, it seems to me that that case is different on its facts and on principle from the present one. In that case some cheeses and candles had been sold and an invoice was sent. The invoice was returned with a note on the back of it. The note complained of the condition in which the goods had arrived and the goods were returned. It was held that " the contents of the " invoice were sufficiently referred to by the note on the back of " it and that the two together constituted a sufficient memor-" andum in writing of the bargain to satisfy the Statute of " Frauds." In the course of a letter which was written by the defendant, it was said that had the goods been sent by canal as they were ordered, they would not have been damaged and in argument to the court it was submitted that from the terms of the letter it would appear that it was a term of the contract that the goods should be sent by canal. In giving judgment, Erle C.J. said (2): " I think the direction to send " them by the canal was not a part of the contract, but only " an order given subsequently as to the mode of carrying it " out." It seems to me that a question whether the plaintiff is to deliver the goods to the defendant or whether the defendant is to collect them from the plaintiff is on quite a different footing from the matter referred to in *Wilkinson* v. *Evans* (1). The decision of the Court of Appeal in *Thirkell* v. *Cambi* (3) has been cited. In the course of his judgment in that case

---

(1) 28 Ch. D. 305.

---

(1) L. R. 1 C. P. 407.

(2) Ibid. 410.

(3) [1919] 2 K. B. 590.

1948

WALFORD *v.* NARIN.

Morris J.

Scrutton L.J., after referring to some of the letters, said (1): "But when all these documents are examined, which, it is said, "contain the terms of the contract and prove that there was no "other contract, it is found that one term, the mode of delivery "of the goods against payment, is not mentioned in the written "statements of the contract." Bankes L.J. referred also to the question of delivery. He used these words (2): "Take "for example the terms as to the mode of delivery and the "conditions of payment." Then, having dealt with the matter he goes on to say: ". . . . for the purposes of this case I will "assume that the letters do contain the terms of the bargain." It seems to me that these passages indicate that a term as to delivery was being regarded as a term that should have been set out in the note or memorandum in writing.

Mr. Duveen sought to distinguish the case of *Thirkell* v. *Cambi* (3) on the ground that delivery in that case and payment were so closely related whereas, in the present case the terms of the contract show that payment was to be irrespective of delivery. In my judgment, that is not a distinction which eliminates the point that a term as to delivery may be a term that ought to be in the note or memorandum in writing of the contract. I must decide this case only in reference to its own facts. It seems to me that as the parties came to an arrangement in regard to delivery, which altered what would have been the position had there been no agreement between them in regard to the topic, the term as to delivery was a term which should have been in the note or memorandum in writing.

For the reasons that I have given I feel compelled to hold that the note or memorandum in writing of the contract here is not sufficient and that, as the point has been taken by the defendant, the claim of the plaintiff does not succeed.

Judgment for the defendant.

Solicitors for the plaintiff: *Walford & Co.*
Solicitors for the defendant: *Gerald Samuels & Co.*

(1) [1919] 2 K. B. 598.
(2) Ibid. 593–4.
(3) Ibid. 590.

C. G. M.

1948
Apr. 16.

Sellers J.

SIMPSON *v.* KODAK LIMITED.

Emergency legislation—Conditions of employment—Award of National Arbitration Tribunal—Jurisdiction of the court—Fair wages clause—Conditions of Employment and National Arbitration Order, 1940 (*St. R. & O.* 1940, *No.* 1305) (*as amended by St. R. & O.* 1942, *No.* 1073 *and St. R. & O.* 1944, *No.* 1437), *art.* 5 (1.) *and* (3.)—*Cinematograph Films Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 17), *s.* 34.

The plaintiff was employed by the defendant company in their films production branch at a weekly wage of 6*l.* 7*s.* 6*d.* By an award dated August 9, 1945, and made between the plaintiff's trade union and an employers' association of which the defendant company was not a member at the time of the award, the National Arbitration Tribunal determined the minimum weekly rate for film workers, who in the allegation of the plaintiff were employed in the same grade as he, at 8*l.* 18*s.* 0*d.*, such rate to have effect retrospectively as from February 1, 1945. During the employment of the plaintiff, the defendant company carried out work for various government departments under contracts which contained the fair wages clause whereby the defendant company undertook to pay rates of wages not less favourable than those commonly recognized in the trade. The plaintiff claimed 121*l.* 4*s.* 0*d.* as arrears for wages for the time between February 1, 1945, to December 31, 1945.

Held, that the court had no jurisdiction to decide whether, on the facts of the case, (1.) the award of August 9, 1945, imposed a direct statutory liability on the defendant company by virtue of art. 5, para. 1, of the Conditions of Employment and National Arbitration Order, 1940, and (2.) the wages which the plaintiff had accepted were less favourable than those which he ought to have received in accordance with s. 34 of the Cinematograph Act, 1938. These questions had to be dealt with by the special machinery of arbitration set up by art. 5, para. 3 of the order and s. 34, sub-s. 1, of the Act respectively.

Hulland v. *William Sanders & Son* [1945] K. B. 78 applied.

Held further, that the "fair wages clause" which was contained in contracts between the defendant company and the relevant government departments did not confer upon the plaintiff any right to sue upon it so as to recover wages different from those which he had accepted.

ACTION.

The plaintiff was for eight years ending December 31, 1945, in the employment of the defendant company as a sight grader in their films production branch at a weekly wage of 5*l.* 5*s.* plus bonus averaging 1*l.* 2*s.* 6*d.*, totalling 6*l.* 7*s.* 6*d.* weekly. By an award dated August 9, 1945, the National Arbitration

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

Tribunal, in an arbitration between the trade union of which the plaintiff was a member and an employers' association of which the defendant company was, at the time of the award, not a member, determined the proper minimum weekly rate for certain film workers, who in the allegation of the plaintiff worked in the same grade as he, at *8l.* 18*s.* 0*d.* weekly, such rate to have effect retrospectively from February 1, 1945. When the plaintiff was in the employment of the defendant company, the latter carried out work for various government departments under contracts which contained the fair wages clause; a sample of these contracts was before the court; it was a Ministry of Aircraft Production document, and the clause was worded as follows: "Fair Wages, Transfer of Con-"tract and Sub-Letting. The contractor shall in the execution "of this contract, observe and fulfil the obligations upon "contractors specified in the Resolution passed by the House "of Commons on the 10th March, 1909, namely:—'The "'contractor shall . . . . pay rates of wages and observe "'hours of labour not less favourable than those commonly "'recognized by employers and trade societies (or, in the "'absence of such recognized wages and hours, those which in "'practice prevail amongst good employers) in the trade in "'the district where the work is carried out. Where there "'are no such wages and hours recognized or prevailing in the "'district, those recognized or prevailing in the nearest district "'in which the general industrial circumstances are similar, "'shall be adopted. Further, the conditions of employment "'generally accepted in the district in the trade concerned "'shall be taken into account in considering how far the terms "'of the Fair Wages Clauses are being observed. The "'contractor shall be prohibited from transferring or assigning "'directly or indirectly, to any person or persons whatever, "'any portion of his contract without the written permission "'of the department. Sub-letting other than that which "'may be customary in the trade concerned, shall be pro-"'hibited. The contractor shall be responsible for the "'observance of the Fair Wages Clauses by the sub-"'contractor'." It was further provided: "The contractor "shall cause a copy of the preceding condition to be "prominently exhibited for the information of his workpeople "on the premises where work is being executed under this "contract." The fair wages clause was duly exhibited at the premises of the defendant company.

The plaintiff, relying on the Conditions of Employment and National Arbitration Order, 1940, art. 5 (1), on the Cinematograph Films Act, 1938, s. 34 (2), and on the fair

(1) Conditions of Employment and National Arbitration Order, 1940, art. 5 (as amended): (1.) Where in any trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organizations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry in that district (hereafter referred to as "recognized terms "and conditions") all employers in that trade or industry in that district shall observe the recognized terms and conditions or such terms and conditions of employment as are not less favourable than the recognized terms and conditions.

(3.) If any question arises as to the nature, scope or effect of the recognized terms and conditions in any trade or industry in any district or as to whether an employer is or was observing the recognized terms and conditions or is or was observing terms and conditions which are or were not less favourable than the recognized terms and conditions, that question may be reported to the Minister at any time within twelve months of the date on which the question first arose by any organization of employers or trade union which in the opinion of the Minister is an organization or trade union that habitually takes part in the settlement of wages and working conditions in the trade or industry concerned and if so reported the question shall thereupon be dealt with in the same manner as if it were a trade dispute reported to the Minister under the provisions of art. 2 of this order . . . . Any report of any such question as aforesaid shall be in writing and shall contain such particulars as the Minister may require.

(2) Cinematograph Films Act, 1938, s. 34: (1.) The wages paid by any person carrying on in Great Britain the business of making films to which this Act applies to persons employed by him in connexion with that business, and the conditions of employment of persons so employed, shall, unless agreed upon by the employer and by organizations representative of the persons employed, be not less favourable to the person employed than the wages which would be payable, and the conditions which would have to be observed, under a contract which complied with the requirements of any resolution of the House of Commons for the time being in force applicable to contracts of government departments; and if any dispute arises as to what wages ought to be paid, or what conditions ought to be observed, in accordance with this section, it shall, if not otherwise disposed of, be referred by the Board of Trade to the industrial court for settlement.

(3.) Where any award has been made by the industrial court upon a dispute referred to that court under this section, then, as from the date of the award or from such later date as the court may direct, it shall be an implied term of the contract between the wages clause embodied in the contracts of the defendant company with the government, contended that he was entitled to arrears of wages for the time between February 1 and December 31, 1945, and claimed 121*l.* 4*s.* 0*d.*

Harry Samuels for the plaintiff. The plaintiff's claim is based on three grounds; first, on the award of the National Arbitration tribunal.

[SELLERS J. Has the court jurisdiction to entertain the claim? Is not the case covered by *Hulland* v. *Sanders & Son* (1)?]

It is submitted that the court has jurisdiction and that the case does not fall under para. 3 of art. 5 of the Conditions of Employment and National Arbitration Order, 1940. [Counsel referred to *George* v. *Mitchell and King* (2).] The order does not provide that the National Arbitration Tribunal has to decide questions such as arise here. Secondly, the claim is based on the Cinematograph Films Act, 1938, s. 34, and thirdly on the fair wages clause in the government contracts; it is undisputed that that clause was embodied in the contracts.

Scott Cairns K.C. and *Roche*. The award does not apply to the plaintiff or the defendant company by virtue of para. 3 of art. 5 of the order. The plaintiff was not an employee of the grade alleged by him, and the defendant company was not an employer to whom the award applied. The scope of the award has to be considered solely by the National Arbitration Tribunal, and even if the tribunal has no jurisdiction, it does not follow that the court has jurisdiction. The fair wages clause is contained in contracts between the defendant company and the government; the plaintiff cannot rely on it.

SELLERS J. The basis of the plaintiff's claim is sought to be supported on three grounds. First it is said that the plaintiff has been underpaid, and is entitled to a higher rate of remuneration under an award of the National Arbitration Tribunal. That award was made on August 9, 1945, and is award No. 758. It is one arrived at

employer and workers to whom the award applies that the rate of wages to be paid, or the conditions of employment to be observed, under the contract shall, until varied in accordance with the provisions of this section, be in accordance with the award.

(1) [1945] K. B. 78.

(2) [1943] 1 All E. R. 233.

between the members of the Association of Film Laboratory Employers, and certain employees of such members. Indeed the workers' representatives were the representatives of the trade union of which the plaintiff was then, and I understand was at the commencement of this action, a member. That award was published in August, 1945, and was made applicable as from the first pay day in February of that year. In order to support the claim for remuneration in accordance with that award, the plaintiff relies on a provision of the order which sets up that tribunal, which has been amended from its original form—that is the Conditions of Employment and National Arbitration Order, 1940 (St. R. & O. 1940, No. 1305), made by the Minister of Labour and National Service under reg. 58AA of the Defence (General) Regulations, 1939. Part I of that order sets up the tribunal and reliance is placed by the plaintiff on a provision in Part I., art. 2, para. 5, which provides that: "Any agreement, decision or award made by virtue of the "foregoing provisions of this article shall be binding on the "employers and workers to whom the agreement, decision or "award relates and, as from the date of such agreement, "decision or award or as from such date as may be specified "therein not being earlier than the date on which the dispute "to which the agreement, decision or award relates first arose, "it shall be an implied term of the contract between the "employers and workers to whom the agreement, decision or "award relates that the rate of wages to be paid and the "conditions of employment to be observed under the contract "shall be in accordance with such agreement, decision or "award until varied by a subsequent agreement, decision or "award." The plaintiff relies further on Part III., art. 5, para. 1, which, as amended, reads as follows: [His Lordship read the paragraph.]

Now it appears that the defendant company was not a member at the time of the award, upon which reliance is sought, of the Association of Film Laboratory Employers. Therefore, the obligations set out in that award do not fall upon them by reason of art. 2, para. 5 of the Conditions of Employment and National Arbitration Order. With regard to the reliance placed on art. 5, para. 1, it is said on behalf of the plaintiff that that imposed a direct statutory liability on the employers, in the circumstances and facts of this case, to pay the plaintiff during the relative period in accordance with that award. That submission requires consideration of a number of matters which are indicated in that paragraph of the article. I think the summary made by counsel on behalf of the defendant company as to the issues of facts which arise there, were rightly stated by him to be, that there has to be an investigation of the question whether the terms and conditions of employment are established by the arbitration between the organized representatives of a substantial proportion of employers, and of the workers engaged in the particular industry. Some evidence has been adduced with regard to that. Secondly, it is necessary to consider whether the defendant company is an employer in that industry to which the arbitration award relates; thirdly, whether the plaintiff is a worker in the same grade as the grade referred to in the award, so that the amount specified would be applicable to him, and fourthly whether the terms and conditions under which the plaintiff worked for the defendant company are less favourable than those in the award. Those are all difficult questions of facts to decide, and require close investigation of many factors affecting this industry, and perhaps industries in general.

The defendant company says that this court is not called on to consider that matter, because there is provided in the order itself, and in the same article of the order, the necessary machinery for considering those questions, and reference has been made to art. 5, para. 3, and art. 5, para. 4 (*a*), in the amended regulation. I need not read those, or consider them in any great detail, because it has been submitted, and I think rightly submitted, that the question which arises under the first claim of the plaintiff has been decided by authority. That authority is the case of *Hulland* v. *William Sanders & Son* (1), where a similar question arose, except that the claim was not under an arbitration award, but was under a negotiated settlement by a joint industrial council or committee. *Hulland* v. *Sanders & Son* (1) dealt with the very question which arises here, as to who has to decide the various issues which arise under art. 5, para. 1, whereby a claim such as this may be advanced. The headnote of that case having set out the terms of art. 5, para. 1, which I have read, continues: "Where such an employer has paid a lower rate of "wages than those so settled a right of action will not "arise under art. 5, para. 1, enabling the worker to sue for "and recover either the arrears of wages or damages for breach "of the statutory duty. The question whether an employer

(1) [1945] K. B. 78.

"has failed to pay the settled rate of wages may, by art. 5, "para. 3, be reported to the Minister by any organization or "trade union and shall then be referred by him to the National "Arbitration Tribunal established under Part I of the order. "Under para. 4 and art. 2, para. 5, it is only where an award "has been made by the tribunal that, from a date fixed as there "provided, it becomes an implied term of the contract that the "rate of wages shall be in accordance with the award so as to "give the worker a right to sue." There have been, as I have said, slight amendments to the order, which have made some modification, and also the numbering of the paragraphs has been altered, but there is no alteration in the order which in any way affects or alters the decision which was arrived at by the Court of Appeal in *Hulland's* case (1). Therefore, it seems to me concluded against the plaintiff that there is any implied term of his contract, or any statutory right to sue, for what he alleges to be the insufficiency of the wages which he has received. He has not established any contractual or other right to recover anything more than that which he has accepted.

The next ground on which he bases his claim is under the Cinematograph Films Act, 1938. He relies on s. 34, sub-s. 1. The question which arises for consideration in this case, is whether that section entitles the plaintiff to sue, and to recover, if he establishes the facts which are necessary to show that what he was receiving was less favourable than that which he ought to have received, if the fair wages clause had been applied. The section itself seems to me clearly to defeat his claim in this action on very much the same grounds as are shown in *Hulland* v. *Sanders & Son* (1), because provision is made in this Act, as provision was made under the Arbitration Rules, for dealing with any disputes; it is provided by sub-s. 1 of s. 34: "If any dispute arises as to what wages ought to be "paid, or what conditions ought to be observed, in accordance "with this section, it shall, if not otherwise disposed of, "be referred by the Board of Trade to the industrial court "for settlement."

It was argued that "if not otherwise disposed of" would not oust the jurisdiction of this court, but when one turns to s. 34, sub-s. 3, it makes it clear, I think, that there is no right of action other than that which arises on the original contract between the parties, until some implication has been established that some different rate of wage prevails. So that there again on

(1) [1945] K. B. 78.

like grounds to those which prevailed in *Hulland* v. *Sanders & Son* (1), the plaintiff has not taken those steps which entitle him to sue for those differences which he alleges would be established if the case was investigated on its facts.

That does not end his claim, because he advances it on a third ground. The third ground is this, that it is said and admitted that the defendant company was at some time during the plaintiff's employment (which started in 1937), under contract with various government departments, which contained the fair wages clause. The matter has not been gone into in great detail, but it is conceded that there were such contracts, and a sample of one of them has been put in before me. It is a Ministry of Aircraft Production document. I do not know that I have, on the conditions which have been supplied to me, got the date of the particular contract from which they have been extracted, but there is no doubt that certainly during the later years of the plaintiff's employment, a great deal of work was done by the defendant company for this particular department of the government. The fair wages clause in the sample conditions of the Ministry of Aircraft Production document which has been put before me, is cl. 11. There is evidence that at some time, not clearly specified, the fair wages clause was exhibited at the defendant company's premises, as no doubt it would be, having regard to that obligation. There is no evidence that the plaintiff ever saw it.

Even if he had seen it, it does not seem to me that that clause, which exists in a contract between the employers and the government, imposes any right upon the plaintiff to sue upon it so as to recover wages different from those which he was getting. It might be that if he knew of it, and certain things were done and said with regard to it, that that might give rise to some implications as to the rates of wages to which he was entitled, but there is quite insufficient evidence before me to show that there was any implied term other than that on which he had been paid as to his remuneration for the work he was doing. If he knew about this fair wages clause, and week by week accepted the wages which he did, it seems to me very strong evidence that he was accepting them as a compliance with the standard which was imposed on the defendant company by their contract with the government. It is very far from showing that he was in any position to enforce any different rate by any implied contract to the contrary.

---

(1) [1945] K. B. 78.

Therefore, the three grounds as I see them on which this claim is based, fail, and the view I take of the matter is that the action is misconceived.

Many issues arose in the course of this case as to the facts which may have to be investigated if the plaintiff takes the steps which are contemplated, both with regard to the award, and under the Cinematograph Films Act, 1938. The defendant company here chose on those points which have been raised to call no evidence, because they relied on the legal position as it stood. Therefore, I think it would be unwise for me to make any pronouncements on any of the issues, as they have arisen, and may arise, if the case goes elsewhere. All I can say is that on the last one, on the fair wages clause, that if I were asked to say—I do not think I am—whether there was here established to me any breach of that requirement by the defendant company, if the plaintiff could have relied on it, I should say unhesitatingly that I am not satisfied that there was any breach, that the conditions under which the plaintiff worked, the work he was doing, and the remuneration he was getting, do not seem to me to be in conflict with the requirements of the contract with the defendant company. On the other issues, as I say, which arise more particularly under art. 5 of the Conditions of Employment and National Arbitration Order, I propose to say nothing. This action in my view fails, because the plaintiff has not shown that there was any contractual or other right entitling him to any wages other than those which he had been paid. There must, therefore, be judgment for the defendant company.

Action dismissed.

Solicitors for the plaintiff: *Pollard, Cooper & Thorowgood.*

Solicitors for the defendant company: *Bristows, Cooke & Carpmael.*

REX *v.* GOVERNOR OF WORMWOOD SCRUBS PRISON.
Ex parte BOYDELL.

1948
Feb. 26, 27.

Lord Goddard C.J., Humphreys and Denning JJ.

Habeas corpus—Military law—Officer holding emergency commission released from military duty—Arrested after release—Subsequently convicted by court-martial of offences committed before release—Whether subject to military law after release—Jurisdiction of court-martial—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Army Act*, 1881, *as amended* (44 *&* 45 *Vict.*, c. 58), *ss.* 158, 175, *sub-ss.* 1, 190, *sub-s.* 8—*Royal Warrant for regulating Pay, Appointment, Promotion and Non-Effective Pay of the Army*, 1940, *art.* 21—*Royal Warrant, dated June* 18, 1945, *Army Order* 83.

An officer holding an emergency commission in the army was released from military duty under the provisions of the Royal Warrant containing Army Order 83 of June 18, 1945. More than three months after his release he was arrested by order of the military authorities, tried by court-martial, found guilty of several offences of fraudulent conversion committed while he was on military duty before his release, and sentenced to eighteen months imprisonment. He applied for a writ of habeas corpus.

Held that as the officer had ceased within the meaning of sub-s. 8 of s. 190 of the Army Act, 1881, to be liable continuously to render military service, and as by the provisions of Army Order 83 he was after his release from military duty no longer entitled to army pay, he was at the respective dates of his arrest and trial no longer an officer of the regular forces on the active list, and therefore, he was no longer subject to military law within the meaning of s. 175, sub-s. 1 of the Army Act; he was, therefore, illegally detained in custody, the writ should issue and he should be discharged.

The Royal Warrant for Pay, Appointment, Promotion, etc., of 1940 was the royal warrant for regulating the pay and promotion of the regular forces within the meaning of s. 175, sub-s. 1, of the Army Act at the respective dates of the arrest and trial. Army Order 83 did not constitute a royal warrant for regulating pay and promotion within that meaning, because in so far as it dealt with pay and promotion, it merely provided that during the period of release an emergency officer should be paid nothing and should receive no promotion.

The words " or otherwise " in art. 21 of the Royal Warrant of 1940 when read in conjunction with the words " full pay " and " half pay " must mean " any other kind of pay," and therefore the test laid down by that article for deciding whether or not an officer was on the active list within the meaning of that article was whether or not he received pay.

As statutory effect had been given by s. 75, sub-s. 1, of the Army Act to art. 21 of the Royal Warrant of 1940, it followed that

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

the words "shall remain on the active list of our regular army" occurring in Army Order 83 were void and contrary to the Army Act.

APPLICATION for writ of habeas corpus.

On June 15, 1940, the applicant was granted an emergency commission in the army. On December 15, 1945, he was released from military duty in pursuance of Army Order No. 83, contained in the Royal Warrant, dated June 18, 1945, which stated that he was liable to be recalled to military duty if required. On December 2, 1946, he was visited at his home by a provost officer, who arrested him and took him to Luneberg, Germany.

On May 20 and 21, 1947, he was tried by general court-martial at Luneberg and found guilty on seven different charges of fraudulent conversion of property contrary to s. 20, sub-s. 1 (iv.) (*b*) of the Larceny Act, 1916, and s. 41 of the Army Act, the offences having been committed while he was serving as an officer in Germany during the months of June, July and August, 1945. He was sentenced to be cashiered and to be imprisoned for two years, which period was reduced to eighteen months by the confirming officer. He was subsequently detained for the purpose of serving his term of imprisonment in Wormwood Scrubs Prison, England.

The present application was made on the ground that the court-martial which tried him on May 20 and 21, 1947, had no jurisdiction to do so, as he was by then no longer subject to military law.

Peter Lewis for the applicant. It is common ground that in order that the court-martial should have jurisdiction to try the applicant he must have been subject to military law at the date of his trial. My submission is that he ceased to be subject to military law on December 15, 1945, the date of his release.

Section 175, sub-s. 1 of the Army Act (1) provides that persons subject to military law as officers are officers of the regular forces on the active list within the meaning of any

---

(1) Army Act, 1881, s. 175, sub-s. 1: "The persons in this "section mentioned are persons "subject to military law as "officers and this Act shall apply "accordingly to all persons so "specified; that is to say, (1.) all "officers of the regular forces on "the active list, within the meaning of any royal warrant for "regulating the pay and "promotion of the regular forces "...."

1948

REX
v.
GOVERNOR
OF
WORMWOOD
SCRUBS
PRISON.
Ex parte
BOYDELL.

royal warrant for regulating pay and promotion of the regular forces.

By s. 190, sub-s. 8, of the Army Act (1) in order to belong, to the "regular forces" an officer must, by his commission, be liable to render continuously for a term military service. The appellant was released under the special provisions for emergency officers provided by Army Order 83 contained in the Royal Warrant, dated June 18, 1945 (2) and that Army Order provided for the release of an emergency officer from military duty. He, therefore, after such release could not possibly have been liable to render continuously for a term military service within the meaning of s. 190, sub-s. 8. He, therefore, ceased as from the date of his release to be a member of the regular forces.

The applicant ceased to be on the active list as from the date of his release on December 15, 1945. In order to ascertain whether an officer is on the active list one must ascertain, in accordance with s. 175, sub-s. 1, of the Army Act, who is such an officer within the meaning of any royal warrant for regulating the pay and promotion of the regular forces. The only warrant for regulating the pay and promotion of the regular forces, which was in force at all material times, was the Royal Warrant for Pay, Appointment, Promotion and Non-Effective Pay of the Army, 1940. The relevant article of that Royal Warrant is art. 21 (1) which provides: "Officers "on the active list shall mean officers of the regular forces "whether on full pay, half pay or otherwise before their "retirement . . . ." The words "or otherwise" are obviously ejusdem generis with the words "full pay" and "half "pay" in that article and cannot mean "no pay at all." By the provisions of Army Order 83, it is definitely stated that a released officer "shall not after the effectual date of such "release . . . . be entitled to Army pay or other emoluments ". . . . during such period," namely, the period during which he continues to be released.

---

(1) Section 190: "In this Act, "if not inconsistent with the "context, the following ex- "pressions have the meanings "hereinafter respectively assigned "to them; that is to say . . . . "(8.) The expressions 'regular "'forces' and 'His Majesty's "'regular forces' mean officers "and soldiers who by their com- "mission, terms of enlistment, "or otherwise, are liable to render "continuously for a term military "service to His Majesty in every "part of the world or in any "specified part of the world . . . ."

(2) Royal Warrant, dated June 18, 1945. Army Order No. 83. "Whereas we deem it "expedient to provide that officers "who have been granted "emergency commissions in our "land forces with our regular "Army may be released from "military duty before the termin- "ation of the present emergency: "our will and pleasure is that an "officer as aforesaid may be "released from military duty . . . . "and . . . . . be placed on the "unemployed list with liability to "be recalled to military duty if "and when required until the end "of the present emergency; . . . . "Our further will and pleasure is "that an officer so released shall "remain on the active list of our "regular Army while on the un- "employed list, but shall not after "the effective date of such release, "as may be determined by our "Army Council, be entitled to "Army pay or other emoluments, "other than any non-effective "award for which he may be "eligible . . . . ; nor shall he be "eligible for promotion during "such period."

It follows, therefore, that as the applicant was deprived of all pay as from the date of his release on December 15, 1945, he was as from that date no longer an officer on the active list, and as he was no longer a member of the regular forces, he had ceased to fulfil either of the two conditions the fulfilment of which was necessary in order that a person should be subject to military law as an officer, as provided by s. 175, sub-s. 1 of the Army Act.

Apparently the respondents rely on Army Order 83 as being a royal warrant for regulating pay and promotion, and they, therefore, rely on that part of it which provides that "an "officer so released shall remain on the active list of our "regular Army while on the unemployed list . . . ." I however submit that Army Order 83 does not regulate pay or promotion, for all it has to do with pay and promotion is to stop it altogether during the period of the release.

To regulate something or the doing of something is quite different from getting rid of it, or from stopping it being done.

[He referred to *Toronto Municipal Corporation* v. *Virgo* (2), and *Ward* v. *Folkestone Waterworks Company* (3).]

As statutory effect was given to art. 21 by s. 175, sub-s. 1 of the Army Act, it follows that the words "an officer so "released shall remain on the active list," occurring in Army Order 83, are void and have no effect, for they are contrary to art. 21 and are therefore contrary to the Army Act.

---

(1) Royal Warrant for Pay, Appointment, Promotion and Non-Effective Pay of the Army, 1940, art. 21: "Officers on "the active list shall mean officers "of the regular forces whether on "full pay, half pay, or otherwise "before their retirement . . . ."

(2) [1896] A. C. 88.

(3) (1890) 24 Q. B. D. 334.

H. L. Parker for the respondents the Governor of Wormwood Scrubs Prison and the Secretary of State for War.

These emergency commissions were given, among other persons, to soldiers who where in the ranks. By para. 1 of Appendix XXVI of the King's Regulations at p. 698 of the 1940 issue, it is provided that these emergency commissions will be relinquished on the conclusion of the emergency. This man, therefore, was liable to serve until the conclusion of the emergency. It is not necessary for them to be paid all the time. There are many officers now serving in the Dominions who are not being paid by the Government of the United Kingdom. The sole question here is not whether the man was at the time performing military duty, but whether he was subject to the Army Act.

The Royal Warrant of 1945 containing Army Order 85 provides for the termination of an emergency commission on a specified date to be notified. No date was notified to the appellant under that order at any material time, and he had not been permitted to resign, and an army officer cannot resign without the permission of the Army Council. Nor had he retired, nor had he been gazetted out of the army. He, therefore, was always the holder of an army commission. He was released upon terms, and those terms were contained in Army Order 83 of 1945.

The applicant continued to be an officer of the regular forces within the meaning of sub-s. 8, s. 190, of the Army Act, because he always was liable by his commission even after his release to render continuous service to His Majesty. By the terms of his commission he was liable to render service to His Majesty during the whole of the time that he held that commission and it is admitted that he had not relinquished his commission.

[Lord Goddard C.J. His Majesty really says: "I do not "want you now. You can go and carry on any work you "like. You will receive no pay, and you will continue like "that until you are called up to serve again." You say that that is continuous service.]

By the terms of his commission he is liable all the time during which he holds it to render service. Section 190, sub-s. 8, of the Army Act says that officers of the regular forces are liable by their commissions to render continuously for a term military service. The applicant here was so liable to render military service for the term of the present emergency.

That does not mean that he cannot be released temporarily by His Majesty. What it means is that he is liable, if His Majesty so wishes, to render military service throughout that term, and, that being so, he was still an officer of the regular forces after his release. Army Order 83 says "with liability to be "recalled for military duty." That shows that the liability which always was there from the date of the commission is to continue until the end of the emergency.

Army Order 83 regulates pay and promotion, for it provides that for a time pay and promotion is to be suspended and, therefore, that Order is one of the Royal Warrants for regulating pay and promotion within the meaning of s. 175, sub-s. 1, of the Army Act. Even if this is wrong, I rely on art. 21 of the Royal Pay Warrant of 1940, for the words "full pay, half "pay or otherwise" mean "full pay, half pay or no pay," for there is no intention shown in this Royal Warrant that the words "or otherwise" should be construed ejusdem generis.

Cur. adv. vult.

LORD GODDARD C.J., in giving the judgment of the court, stated the facts set out above and continued: I may point out that in the circumstances of arrest the applicant obviously had no opportunity of applying either for bail or, at that time, for a writ of habeas corpus. The case raises a question of the highest constitutional importance and is one which affects a large number of His Majesty's subjects who were granted emergency commissions and who, if the contention of the Crown is correct, are still in this present year subject to military law, and will remain so until the emergency, which it is said still exists, is terminated in some lawful manner. The court approaches this case fully conscious of the gravity of the issues raised.

The offences for which the prisoner was convicted were said to have been committed, and the court so assumes, while the prisoner was subject to military law, and it is therefore necessary first to refer to s. 158, sub-s. 1 (1). [His Lordship read the section.] I may say that the offence for which the prisoner was tried was not either mutiny, desertion or fraudulent enlistment. The prisoner contends that he ceased to be subject to military law on his release in December, 1945, and therefore, as more than three months had elapsed before his arrest and trial, the court-martial had no jurisdiction to try him.

---

(1) Army Act, 1881, s. 158: "(1.) Where an offence under this "Act has been committed by "any person while subject to "military law, such person may "be taken into and kept in mili"tary custody, and tried and "punished for such offence, "although he, or the corps or "battalion to which he belongs, "has ceased to be subject to "military law, in like manner as he "might have been taken into and "kept in military custody, tried "or punished, if he or such corps "or battalion had continued so

Part V of the Army Act deals with persons subject to military law and by s. 175, sub-s. 1, it is provided: "The persons in this "section mentioned are persons subject to military law as "officers, and this Act shall apply accordingly to all the persons "so specified; that is to say (1.) officers of the regular forces "on the active list, within the meaning of any Royal Warrant "for regulating the pay and promotion of the regular forces." The rest of that sub-section has no bearing on the present case.

A Royal Warrant dated February 29, 1940, which deals with the pay, appointment, promotion and non-effective pay of the army, by cl. 21, defines officers on the active list in these terms: "'Officers on the active list' shall mean officers of the "Regular Forces, whether on full pay, half-pay or otherwise, "before their retirement, and shall not include officers who have "retired and are subsequently recalled to service under "Article 522 or re-employed under Article 495."

It thus becomes necessary to look at the definition of "Regular Forces," which is to be found in s. 190, sub-s. 8, of the Army Act, but before examining the provisions of these sections I will refer to the Royal Warrant, Army Order 83, 1945, under which the prisoner was released from the army. [His Lordship read the beginning portion of Army Order 83.] Then follows this most important clause: "Our further will "and pleasure is that an officer so released shall remain "on the active list of our Regular Army while on the "Unemployed List, but shall not after the effective date of "such release, as may be determined by our Army Council, "be entitled to Army pay or other emoluments, other than any

---

"subject. Provided that where a "person has since the commission "of an offence ceased to be subject "to military law, he shall not be "tried for such offence, except in "the case of the offence of mutiny, "desertion, fraudulent enlistment, "unless his trial commences "within three months after "he has ceased to be subject to "military law; but this section "shall not affect the jurisdiction "of a civil court in the case of any "offence triable by such court as "well as by court-martial."

"non-effective award for which he may be eligible or may "become eligible. Neither shall he be eligible to count any "period served on such Unemployed List towards increment "of pay or promotion, or for the purposes of any non-effective "award; nor shall he be eligible for promotion during such "period."

It is this clause providing that an officer released from military duty, who is to receive no further pay and whose service on the unemployed list is to count neither for increment of pay nor pension, who is not eligible for further promotion, and who, according to the Army Council instruction, is not to wear uniform, shall yet remain on the active list, which is challenged. It is challenged on the ground that it conflicts with the statute, and if it is not authorized by the statute it is clearly ineffective and ultra vires.

Sub-section 8 of s. 190 of the Army Act is in these terms: "The expression 'regular forces' and 'His Majesty's regular "'forces' mean officers and soldiers who by their commission, "terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in every "part of the world, or in any specified part of the world, "including soldiers of the reserve forces when called out on "permanent service."

Mr. Parker for the respondents contended that by the terms of his commission the officer is liable to render continuously for a term military service to His Majesty. We have been given a copy of an officer's commission and it appears to us that it relates solely to the military duty of the officer to whom the commission is granted. If His Majesty is pleased to release an officer from all military duty, unless and until he is recalled to duty, in our opinion he is not liable, during his release, to render military duty continuously. The latter word implies continuity, and the period of release breaks the continuity. The words "or otherwise" must have some meaning attached to them and if His Majesty, who has granted the commission, is pleased to absolve the officer from the obligations thereof and to discontinue the pay which the holding of a commission would otherwise entitle him to receive, it seems to us that it would be a misuse of language to say that the officer is, during the period of release, liable continuously to render military service. In our opinion, therefore, the prisoner was not after December 15, 1945, an officer of the regular forces, and that part of the royal warrant which declares that an officer so released shall remain on the active list of the Regular Army is ineffective and contrary to the statute.

Mr. Parker contended that the royal warrant of June 18 was a royal warrant for regulating pay and promotion. One short answer is that it does not purport to be. It purports to be a warrant providing for the release of officers holding emergency commissions, and the fact that it says that during the period of release he shall be paid nothing and receive no promotion is not, in our opinion, any ground for saying that it is one which regulates either. This opinion is reinforced by the cases referred to by Mr. Lewis for the applicant, although apart from authority we should be of the opinion that we have expressed.

But even if a released officer could be held to be an officer of the regular forces, to be subject to military law he must be on the active list within the meaning of any royal warrant for regulating pay and promotion. This at once calls attention to the close and natural connexion between pay and the active list. The one would seem complementary to the other, for while there may well be cases of an officer receiving pay, though not called on to perform services, for instance those on half-pay due to medical unfitness, it would be remarkable indeed if an officer was on the active list and yet not entitled to any pay. We have already rejected the submission that Army Order 83 of 1945 is to be regarded as a pay warrant for regulating pay.

In our opinion the effective warrant is that of February 29, 1940. That, in fact, is the warrant which regulates all sorts and descriptions of pay and its comprehensive character can be seen by a glance at the table of contents. We have already referred to and read art. 21 and the words which require consideration are " whether on full pay, half-pay, or otherwise." The words " or otherwise " in a pay warrant, especially when read either in conjunction with or in contrast to " full pay " or " half pay " must, in our opinion, mean " or any other kind " of pay." If pay has nothing to do with the question, so that if a regular officer is on the active list whether he receives pay or not, why should the statute refer to the pay warrant to find out if an officer is on the active list or not and what concern has the pay warrant with officers who receive no pay ? In our opinion the test whether an officer of the regular forces is on the active list, is whether he receives pay or whether he does not.

It follows that in our opinion the applicant was not, at the time either of his arrest or trial, an officer of the regular forces on the active list and so was not subject to military law.

While this court is not concerned with results, it would certainly be surprising to find that men holding emergency commissions are in a different category in this respect to officers of the reserve or the Territorials, or indeed to any other warrant officers, non-commissioned officers, or private soldiers, who may be released under the terms of any warrant and who, it was conceded, are not subject to military law after release. It would be no less surprising to find that hundreds, and probably thousands, of officers released and returned to civilian life and occupation for over two years are none the less now, while going about their everyday life, still subject to military law and discipline. Were this the case, it would seem that one of these released officers, who might be seen consorting with private soldiers in a public-house, could be charged with conduct prejudicial to good order and military discipline, or if he misbehaved in public could, instead of being dealt with by magistrates, be taken before a court-martial and charged with conduct unbecoming an officer and gentleman. The paragraph in the royal warrant which purports to retain the applicant on the active list is, in the opinion of this court, void as in conflict with the Act of Parliament. It follows that the applicant is illegally in custody. The writ will issue. Let the prisoner be discharged.

Order for writ of habeas corpus granted.
Order made for discharge of applicant. Peremptory order of certiorari to bring up conviction and quash it.

Solicitors for applicant: *A. Kramer & Co.*
Solicitor for respondents: *Treasury Solicitor.*

REX *v.* FITZPATRICK.

C. C. A.

1948
Apr. 7, 19.

Lord Goddard C.J., Humphreys and Pritchard JJ.

Criminal law—Customs and excise offences—Dealing in Swiss watches—Prohibited goods—Uncustomed goods—Goods on which purchase tax had not been paid—Burden of proof on defendant to show legal dealing—Contention on behalf of defendant that burden of proof only shifted to defendant if goods seized — Contention unsustainable—Customs Consolidation Act, 1876 (39 & 40 *Vict., c.* 36), *ss.* 186, 259.

In a prosecution under the Customs Acts for recovering any penalty the provision of s. 259 of the Customs (Consolidation) Act, 1876, that the burden of proof shall be on the defendant applies not only where the goods in respect of which the prosecution is brought have been seized but also where such goods have not been seized.

Mrs. F. was charged on an indictment containing three counts under s. 186 of the Customs (Consolidation) Act, 1876, with offences in respect of forty-six Swiss watches, namely, (1.) unlawfully dealing with the said watches with intent to evade the prohibition applicable to them contained in the Import of Goods (Control) Order, 1940, made by the Board of Trade under s. 1 of the Import and Customs Powers (Defence) Act, 1939, (2.) unlawfully dealing with the said watches in respect of which duties of customs had not been paid, and (3.) unlawfully dealing with the said watches in respect of which purchase tax had not been paid in accordance with s. 18 of the Finance (No. 2) Act, 1940. The Crown proved that Mrs. F. had dealt with all of the watches, but only six of them had been seized.

It was contended on behalf of Mrs. F. that on the proper construction of s. 259 of the Act of 1876 the provision with regard to the shifting on to the defendant the burden of proving what in this case would be that (1.) the goods had been lawfully imported, (2.) the duties of customs had been paid on them, and (3.) the purchase tax had been paid on them, could only apply to the goods which had been seized, and, therefore, could not apply to the forty watches which had not been seized.

Held that in all three counts the burden of proof in accordance with s. 259 of the Act had been shifted on to Mrs. F. in respect of all the forty-six watches, for in all the counts Mrs. F. had been prosecuted for the recovery of penalties.

APPEAL against conviction.

An indictment was preferred at the Essex quarter sessions against Mrs. Therese Fitzpatrick, her husband and one Newton containing three counts. The first count charged them with unlawfully dealing with certain prohibited goods between September 1, 1946 and April 9, 1947, namely, forty-six watches,

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

contrary to s. 186 of the Customs Consolidation Act, 1876 (1), with intent to evade the prohibition applicable to such goods contained in an Import of Goods (Control) Order, 1940, made by the Board of Trade under s. 1 of the Import, Export and Customs Powers (Defence) Act, 1939. The second count charged them with unlawfully dealing with certain uncustomed goods, namely, the same forty-six watches with intent to defraud His Majesty of the duties thereon contrary to the provisions of s. 186 of the Act of 1876, and the Additional Import Duties (No. 4) Order, 1945, made by the Treasury under ss. 3 and 19 of the Import Duties Act, 1932, and s. 1 of the Import

---

(1) Customs (Consolidation) Act, 1876, s. 186: " Every person who " shall import or bring, or be " concerned in importing or bring- " ing into the United Kingdom " any prohibited goods or any " goods the importation of which " is restricted, contrary to such " prohibition or restriction, " whether the same be unshipped " or not; or shall unship, or assist " or be otherwise concerned in " the unshipping of any goods " which are prohibited, or of any " goods which are restricted and " imported contrary to such " restriction, or of any goods " liable to duty, the duties of " which have not been paid or " secured; or shall deliver, remove, " or withdraw from any ship, " quay, wharf, or other place " previous to the examination " thereof by the proper officer of " customs unless under the care or, " authority of such officer, any " goods imported into the United " Kingdom or any goods entered " to be warehoused after the " landing thereof, so that no " sufficient account is taken thereof " by the proper officer, or so that " the same are not duly ware- " housed; . . . . or shall knowingly " harbour, keep, or conceal, or " knowingly permit or suffer, " or cause or procure to be har- " boured, kept, or concealed, any " prohibited, restricted or un- " customed goods, or any goods " which shall have been illegally " removed without payment of " duty from any warehouse or " place of security in which they " may have been deposited; or " shall knowingly acquire " possession of any such goods; " or shall be in any way know- " ingly concerned in carrying, " removing, depositing, con- " cealing, or in any manner dealing " with any such goods with intent " to defraud Her Majesty of any " duties due thereon, or to evade " any prohibition or restriction of " or applicable to such goods; " or shall be in any way knowingly " concerned in any fraudulent " evasion or attempt at evasion of " any duties of customs, or of the " laws and restrictions of the " customs relating to the impor- " tation, unshipping, landing and " delivery of goods, or otherwise " contrary to the Customs Acts; " shall for each such offence forfeit " either treble the value of the " goods, including the duty pay- " able thereon, or one hundred " pounds, at the election of the " Commissioners of Customs; and " the offender may either be " detained or proceeded against by " summons."

Duties (Emergency Provisions) Act, 1939. The third count charged them with dealing with the same goods on which purchase tax had not been paid with intent to defraud His Majesty of the tax contrary to s. 186 of the Act of 1876 as applied by s. 18 of the Finance (No. 2) Act, 1940, as amended by s. 11 of the Finance Act, 1944.

Newton was acquitted by the jury, and the appellant and her husband were convicted. The appellant was sentenced to two months imprisonment concurrently on each of the three counts and to pay a penalty of 138*l.* on each of those counts. She appealed by leave of the court against her conviction.

On April 8, 1947, the accused man Newton offered some Swiss watches for sale to a man who proved to be a detective officer, and he told him that no duty had been paid in respect of them. Watches are goods the importation of which is prohibited except under licence. These six watches were in due course seized by the customs. In consequence of this conversation with Newton the detective officer visited the house where the appellant and her husband lived and had an interview with the appellant's husband. On that occasion the appellant was present at the interview, but she took no part in the conversation, though she assisted in a search to find a customs receipt which showed that duty had been paid on certain goods including three watches. Evidence was given that the practice at the ports was to allow persons arriving to bring in on payment of duty a few watches for personal or domestic use or as gifts, and it would necessarily follow that a person who was allowed to import a watch or watches with such permission and who paid duty thereon could not be said to be doing so with intent to avoid the prohibition. The matter was reported to the customs authorities. On May 21, 1947, a customs officer and the detective officer visited the appellant's house. On this second visit the appellant admitted that she had on certain occasions brought in altogether fifteen watches after she had visited Switzerland but she said that she had paid duty on them. She admitted that she had employed Newton to sell watches and she put the number as not more than one hundred. But she alleged that she had bought these watches in Petticoat Lane.

She admitted that she had told prospective buyers that no duty had been paid in respect of them, but her excuse was that she had done this to make people think that they were getting them cheaply. The customs receipts produced by the appellant and her husband related only to fifteen watches in all. When proceedings were taken she was charged along with the two other defendants in respect of forty-six watches, namely, the number of watches in regard to which Newton had admitted having dealt on behalf of the appellant or her husband and which included the six watches which had been seized by the customs officers.

The main grounds for the appeal were that (1.) there was no evidence to go to the jury, and (2.) the chairman of the quarter sessions had misdirected the jury in telling them that there had been shifted on to the appellant by reason of the provision of s. 259 of the Customs Consolidation Act, 1876 (1), the burden of proving in respect of all the forty-six watches that (1.) they had been lawfully imported, (2.) the duties of customs had been paid on them, and (3.) the purchase tax had been paid on them. The case is reported on the latter point only.

A. P. Marshall K.C. and *Marston Garsia* for the appellant. There was no evidence to go to the jury. Section 259 of the Customs (Consolidation) Act, 1876, no doubt provides for the shifting of the burden of proof on to the defendant in certain circumstances, but there must be some evidence against the defendant before that burden can be shifted. But if there was some evidence against the appellant, then the burden of proof could only be shifted on to her in respect of the six watches which were seized. The section does not apply to shift the burden in respect of goods which had not been seized and therefore the direction of the chairman that the burden of proof had been shifted on to the appellant in respect of all the forty-six was wrong in law and materially affected the jury's verdict.

---

(1) Customs (Consolidation) Act, 1876, s. 259: "If in any "prosecution in respect of any "goods seized for non-payment of "duties, or any other cause of "forfeiture, or for the recovering "any penalty or penalties under "the Customs Acts, any dispute "shall arise whether the duties of "customs have been paid in "respect of such goods, or whether "the same have been lawfully "imported or lawfully unshipped, "or concerning the place from "whence the goods were brought, "then and in every such case the "proof thereof shall be on the "defendant in such prosecution, "and where any such proceedings "are had in the Exchequer "Division of the High Court of "Justice on the revenue side, the "defendant shall be competent "and compellable to give "evidence."

It will be noticed that the section starts as follows: "If in "any prosecution in respect of goods seized." Those words "goods seized" govern the whole section relevant to the matter of the burden of proof. That is to say they govern the whole section down to the words "the proof thereof shall be on "the defendant." Those words first of all govern the next following words "for the non-payment of duties, or any other "cause of forfeiture, or for recovering of any penalty or "penalties under the Customs Acts." They also govern the next following words namely: "any dispute shall arise "whether the duties of customs have been paid in respect of "such goods," for the words "such goods" clearly refer to the "goods seized." The words "goods seized" also clearly govern the rest of the passage, for the words "same" and "such goods" in the rest of the passage clearly also refer to the words "goods seized." It follows therefore, that the burden of proof shall be on the defendant only in a prosecution in respect of any goods seized. It is admitted that only six of the forty-six watches were seized. Therefore if the burden of proof was to shift at all, it could only have shifted in respect of those six watches and it could not have shifted in respect of the remaining forty watches.

The chairman of the quarter sessions directed the jury that the burden of proof had been shifted under the section in respect of all the forty-six watches. That is a most material misdirection and is sufficient to invalidate the jury's verdict. It is impossible to know how they would have found if they had been properly directed on this point, namely that the burden of proof had shifted with reference to six watches only, and that it had not shifted with reference to forty watches. The appellant should therefore be given the benefit of the doubt.

Even if the verdict had been that the appellant was guilty in respect of the six watches but was not guilty in respect of the forty watches, that verdict would very materially have affected the matter of the penalties, and the sentences of imprisonment.

Eric Neve K.C. and *N. G. Hines* for the Crown. It is wrong to say that, in order that the burden should be shifted under s. 259 the goods must have been seized: the burden is shifted whether the goods have or have not been seized. The section begins as follows: "In any prosecution "in respect of any goods seized for non-payment of duties" Then there is a comma, and I lay particular emphasis on that fact. The section then proceeds as follows: "or for any "cause of forfeiture" Therefore, the insertion of that comma really has the result that the section in effect says in regard to the question of any cause of forfeiture: "If in any prosecution "in respect of any cause of forfeiture" and, furthermore, as there is another comma after the words "cause of forfeiture" the section in effect says with regard to any question of recovering any penalty: "If in any prosecution for recovering "any penalty or penalties under the Customs Acts." In other words what the beginning part of the section, down to the words "Customs Acts" in effect says is: "If in any prosecution (1.) in respect of any goods seized for the non-payment "of duties, or (2.) in respect of any other cause of forfeiture, "or (3.) for the recovery of any penalty or penalties under "the Customs Acts."

[LORD GODDARD C.J. From what you say it appears at any rate that the word "seized" cannot apply to the question of the recovering of any penalty.]

Yes. It is only in accordance with this interpretation that the customs authorities can proceed in places where they know smuggling is taking place and the goods have disappeared.

[HUMPHREYS J. To what goods is the section referring in the passage that reads as follows: "any dispute shall arise "whether any duties of customs have been paid in respect of "such goods"?]

The goods that have been known to come in under a prohibition.

[LORD GODDARD C.J. You must have proceedings for a penalty under the Customs Acts in respect of some goods, but it does not necessarily follow that those goods must have been seized. Is not that a possible meaning?]

Yes. That is right. The applicant has admitted dealing with a hundred Swiss watches. Therefore, she is under the provisions of s. 259 called upon to give an explanation, an innocent one if she can. The explanation which she gave was that she had bought them in Petticoat Lane. That explanation was not sufficient to clear her, and consequently there was ample evidence to support the conviction.

He referred to *Dixon* v. *McAllister* (1).

A. P. Marshall K.C. in reply. The words "such goods" "the same" and again "such goods" occurring in the passage beginning with the words " any dispute shall arise " can only refer to the words " goods seized " occurring at the beginning of the section, for no other kind of goods have been mentioned throughout the section, and the words " such goods " would have no meaning at all on the interpretation put forward by counsel for the prosecution. It follows, therefore, that the provision with regard to the shifting of the burden of proof can only operate in respect of goods which have been seized.

---

(1) [1945] N. I. 48.

Cur. adv. vult.

April 19. LORD GODDARD C.J. read the judgment of the court, which, after dealing with the facts and after setting out the provisions of ss. 186 and 259 of the Act of 1876, continued: Dealing first with the question whether there was any evidence to be left to the jury at the close of the case for the prosecution there was evidence that the appellant had been dealing in Swiss watches. This appeared from her admission to the Customs officer. Swiss watches were prohibited goods and were liable to duty. Six watches had been seized. In the proceedings there was a dispute as to whether duty had been paid in respect of these goods and whether they had been lawfully imported. If, then, the onus of proving that the goods had been lawfully imported and that the duty had been paid was on the appellant, there clearly was a case to go to the jury in respect of six watches. Mr. Marshall, for the appellant, however, contends that the onus was on the appellant only in respect of those six, and as the learned chairman directed the jury that the burden was on her in respect of all the forty-six, this was a misdirection which would invalidate the conviction. The court agreed, as did the prosecution, that if the onus was put on the appellant only with regard to six watches and not in respect to all of them the conviction could not stand. The proposition is that all the prosecution proved was that the appellant had dealt in prohibited goods; there was no evidence from which it could be inferred either that she did so with intent to avoid the prohibition or that she knew they were in this category when she dealt in them, for they might have been imported under licence, still less was there evidence that she knew that duty had not been paid or indeed that duty had not been paid by someone. The question, therefore, is on whom did the onus of proof lie. If the onus was shifted only with regard to six watches, though the greater includes the less, so that a verdict of guilty could pass in respect of part only of the watches included in the indictment it is obvious that the jury might have accepted the appellant's explanation in respect of only six watches and rejected it, as they clearly did, with regard to forty-six watches. We have, therefore, to consider the true construction of s. 259 and determine whether the onus is cast upon a defendant only, as Mr. Marshall contended, in respect of goods which have been seized.

In considering the grammatical construction of the section, it will be observed that the word " for " does not appear before the words " any other cause of forfeiture " in the second line. It seems, therefore, that the section is referring only to two and not three classes of prosecution, (1.) in respect of any goods seized for non-payment of duty or any other cause of forfeiture and (2.) for the recovering any penalty under the Customs Acts. The question then arises as to the meaning to be attached to the words " such goods " and " the same." Prosecutions under the Customs Acts must relate to some goods, for it is with goods that the Acts deal. " Such goods," therefore, may be either goods seized for non-payment of duty or other cause of forfeiture, or goods in respect of which the recovery of a penalty is sought, and which need not necessarily have been seized. That this was the intention of the legislature is confirmed by an examination of other sections in the Act dealing with forfeiture and penalties. By s. 177 dutiable goods unshipped or removed from warehouse without the duty being paid or prohibited goods illegally imported are to be forfeited, and by s. 178 goods the importation of which is restricted are when found or seized deemed to be goods liable to duty and unshipped without payment of duty. Section 207 deals with proceedings for the condemnation and forfeiture in the High Court. These sections, it will be seen, deal with remedies against the goods themselves and for those remedies to be effective it follows that the goods must have been seized. Section 186 imposes penalties on the person who does the acts prohibited by s. 177 and extends the offences in respect of goods to harbouring and dealing with them. Section 218 is the first of a code of sections which, as the cross-heading shows, deal with the course of procedure for recovering penalties, enforcing forfeitures and punishing offenders under the Customs Acts, and s. 259 is part of this code. The cross-heading relating to ss. 259 to 263 is " as to proof in pro-" ceedings," which must refer not only to proceedings in regard to goods seized but also to those in which penalties are the object. The onus is put on the defendant when there is a dispute in the proceedings whether duty has been paid or whether the goods were lawfully imported. The obvious reason for this provision is that the facts must be within the knowledge and often within the exclusive knowledge of the defendant. If, for instance, it is found that he has dealt in prohibited goods, if he can show that he acquired them in the ordinary course of business obviously he would not be guilty of dealing in them with intent to avoid the prohibition. He can prove the positive and unless he had to undertake the proofs the crown would generally have to undertake the proof of a negative. Those who are proved to have dealt in prohibited or uncustomed goods are liable to penalties whether or not the goods have been seized and condemned, and the reasons for shifting the burden of proof exist as much where the goods have been condemned (because they have not been seized), as they do where they have been condemned following on seizure. In our opinion there was no misdirection, and the defendant was called on to establish her innocence not only as to the six watches seized but also in respect of the others.

Other criticisms of the summing up were made by Mr. Marshall; as usually happens in the course of a long summing up some expressions were used which might perhaps have been put differently, but it is unnecessary to go through the passages attacked as in no case did they amount to misdirection which would invalidate the conviction. Accordingly, it must be taken that the jury rejected the appellant's explanation and the conviction must be affirmed.

THE COURT then gave the defendant leave to appeal against sentence and after hearing argument on behalf of the prosecution the court decided to reduce the sentence of imprisonment from two months imprisonment to one month's imprisonment on each of the three counts to run consecutively and to reduce the number of penalties payable from three penalties to two penalties, namely the penalty imposed in respect of the second count and the penalty imposed in respect of the third count.

Appeal against conviction dismissed. Sentence reduced.

Solicitors for the appellant: *William Gorringe & Co.*

Solicitor for the respondents the Crown: *Sir Nazeby Harrington, Solicitor for Customs and Excise.*

Overruled. Moodie v. Hosegood [1952] A.C 61

Applied. Fred Long and Sons, Ltd. v. Burgess. [1949] 2 All E.R. 484.

Distinguished. Harrison v. Hopkins. [1949] 2 All E.R. 597.

Considered. Fred Long & Son Ld. v. Burgess [1950] 1 K. B. 115

Overruled. Moodie v. Hosegood. [1951] 2 All E.R. 582.

1948
Mar. 19.

Tucker, Somervell and Cohen L.JJ.

SMITH AND ANOTHER *v.* MATHER AND ANOTHER.

Landlord and tenant—Rent restriction—" Tenant "—Children living with tenant at her death intestate—Tenancy determined while vested in " Probate Judge "—Claim to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*), *as amended by Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 9.

The principle, laid down in *Thynne* v. *Salmon* [1948] 1 K.B. 482, that the protection given to the widow, or to a member of the family, of a tenant residing with him at his death by their inclusion in the definition of " tenant " in para. (*g*) of s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not operate if the tenant is a contractual tenant whose tenancy passes on his death to his legal personal representatives not being his widow or any member of his family residing with him at his death, applies equally if the tenant dies intestate and no letters of administration are taken out, with the result that the estate is vested in the President of the Probate, Divorce and Admiralty Division under s. 9 of the Administration of Estates Act, 1925.

The contractual tenant of a house within the Rent Restriction Acts died intestate. Her son and daughter were living with her at her death. No letters of administration having been taken out, the estate vested, in accordance with s. 9 of the Act of 1925, in the President of the Probate, Divorce and Admiralty Division, upon whom the landlords proceeded to serve notice duly terminating the contractual tenancy, thereafter bringing proceedings for possession against the deceased tenant's children.

Held (1.) that the due notice served on the President was valid, service of such a notice being the proper procedure for giving effect to the landlords' right to determine the tenancy; and (2.) that the deceased tenant's children did not become statutory tenants of the house on their mother's death, as s. 12, sub-s. 1 (*g*) of the Act of 1920 did not apply in the circumstances and (per Cohen L.J.) the existence of such a statutory tenancy would be inconsistent with the vesting in the President.

Per Somervell L.J. The natural construction of s. 12, sub-s. 1 (*g*) of the Act of 1920 is that the word " tenant " should be restricted to cases in which there is in the deceased tenant no right of tenancy which can be devised or pass on intestacy.

Thynne v. *Salmon* [1948] 1 K. B. 482 applied.

Appeal from St. Helens county court.

The plaintiffs were joint owners of a house within the Rent Restriction Acts of which the mother of the two defendants

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

had been the contractual tenant at her death. The defendants, a son and daughter, were residing with their mother at time of her death. She died intestate in October, 1946, and in December, 1946, the landlords served notice to quit on the President of the Probate, Divorce and Admiralty Division by virtue of s. 9 of the Administration of Estates Act, 1925 (1). No letters of administration were at any time taken out. The landlords' action for possession having been dismissed by the county court judge, they now appealed.

Stephen Chapman for the landlords. This case raises the question expressly left open by Tucker L.J. in *Thynne* v. *Salmon* (2). Here the estate of the deceased tenant has not, as happened in that case, vested in an administrator, for no letters of administration of the estate have been taken out. It has, however, vested by operation of law in the President of the Probate, Divorce and Admiralty Division. It is submitted, therefore, that *Thynne* v. *Salmon* (2) covers this case, and that the landlords are entitled to possession.

J. M. Davies for the defendants. Paragraph (*f*) of s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (3), does not apply here because no executor or administrator of the deceased's estate was ever appointed, so no one derives title under him as original tenant. Paragraph (*g*), therefore, must apply to include these defendants in the expression tenant for they are members of the tenant's family who were residing with her at her death. The argument

---

(1) Administration of Estates Act, 1925, s. 9: "Where a person "dies intestate, his real and personal estate, until administration "is granted in respect thereof, "shall vest in the Probate Judge "in the same manner and to the "same extent as formerly in the "case of personal estate it vested "in the ordinary."

Section 55: ". . . . . (xv.) "'Probate Judge' means the "President of the Probate, "Divorce and Admiralty Division "of the High Court . . . ."

(2) [1948] 1 K. B. 482.

(3) Increase of Rent and Mortgage Interest (Restrictions) Act, 1940, s. 12, sub-s. 1, as amended: ". . . . (*f*) The expressions 'land- "'lord,' 'tenant,' 'mortgagee,' "and 'mortgagor' include any "person from time to time "deriving title under the original "landlord, tenant, mortgagee, or "mortgagor; (*g*) . . . . the ex- "pression 'tenant' includes the "widow of a tenant who was "residing with him at the time "of his death, or, where a tenant "leaves no widow or is a woman, "such member of the tenant's "family so residing as aforesaid "as may be decided in default of "agreement by the county court ". . . ."

C. A.

1948

SMITH
v.
MATHER.

for the defendants does not seek to draw any distinction between the President and an ordinary executor or administrator, but is simply that in the absence of any such personal representative para. (*g*) must apply to protect these defendants. [*Mellows* v. *Low* (1) and *Lawrance* v. *Hartwell* (2) referred to.] The difficulties envisaged by the court in *Thynne* v. *Salmon* (3) do not arise here. For example, the President would not, it is submitted, be liable, with the defendants, for rent.

[TUCKER L.J. But the fatal conflict to which the court drew attention in *Thynne* v. *Salmon* (3) would arise if an administrator were appointed at any future time in the present case.]

Admittedly difficulty would arise on the court's deciding that para. (*g*) applied to protect these defendants; but equally, if it is decided that the paragraph does not apply and that the defendants must quit, a difficulty would be created if letters of administration should be taken out by them or one of them. The difficulty would be a real one if the letters of administration were granted before the order for possession had taken effect and if the notice to quit served on the President were not valid or effective, which, since the President is not entitled to dispose of the estate, may very well be the case. Supposing that, during the hearing of the present appeal, letters of administration were granted to the defendants, they would become administrator of the deceased tenant's estate in possession of this house, and, as such, could claim statutory tenancy under para. (*f*) of s. 12, sub-s. 1, of the Act of 1920, always assuming that the notice to the President was ineffectual.

[SOMERVELL L.J. If the notice was effectual, would not this case be covered by *Thynne* v. *Salmon* (3) ?]

Not necessarily, for, even if the contractual tenancy thereby comes to an end, the President is not such a person as could claim possession. Consequently there is no danger of two parties' being liable for the rent. It is submitted, however, that the notice is bad, and that the tenancy is still subsisting.

Chapman was not called on to reply.

SOMERVELL L.J. [asked by TUCKER L.J., to give judgment first, referred to the facts, and continued :] It seems to me that in circumstances such as the present where a contractual tenancy is subsisting at the time when the tenant dies—I am not now considering the effects of the Rent Restriction Acts—

(1) [1923] 1 K. B. 522.

(2) [1946] K. B. 553.

(3) [1948] 1 K. B. 482.

there must be a power in the landlord to bring the tenancy to an end by whatever notice is provided for in the agreement. As it seems to me, the proper procedure for doing that is the procedure adopted in this case, namely, serving a notice on the President of the Probate, Divorce and Admiralty Division. The particulars of claim recited the facts to which I have referred. In the defence the claim was disputed on the ground that the defendants claimed to be entitled to succeed to the tenancy in accordance with s. 12, sub-s. 1 (*g*) of the Rent Restriction Act of 1920, as amended.

The judge decided in favour of the defendants. There is no real note of the judgment, but the judge's note bears a quotation of a dictum of MacKinnon L.J. in *Summers* v. *Donohue* (1) to the following effect: "If her mother was a contractual tenant with "the plaintiff, then clearly the defendant might claim the "benefit of the Act under s. 12, sub-s. 1 (*g*), of the Act of 1920, "as being, from the death of the contractual tenant, a member "of the tenant's family residing with her at . . . . her death." In that dictum MacKinnon L.J. assumes that the words which I have read are applicable when the deceased was a contractual tenant at the date of her death. We were told by counsel that the county court judge, in coming to his decision, applied that dictum. The dictum, in its generality, is, however, in my view, inconsistent with the decision of this court, given after the county court judge's decision in the present case, in *Thynne* v. *Salmon* (2). There a tenant had died intestate when the contractual tenancy was subsisting. Letters of administration were granted to his married sister who had never resided with him. An unmarried sister was residing with the tenant at the time of his death and had so resided since the beginning of the tenancy. The married sister did nothing to create a tenancy between herself and the unmarried sister. The landlord served a notice to quit on the contractual tenant, and on its expiry applied for possession against the unmarried sister. It was held by Tucker L.J. and Roxburgh J., Bucknill L.J., dissenting, that s. 12, sub-s. 1 (*g*), did not apply where the tenancy vested in a contractual tenant at his death had passed by his will or on his intestacy to some person other than his widow or a member of his family residing with him at the time of his death; and, therefore, that the unmarried sister was not entitled to the protection afforded by that paragraph. Tucker L.J., in the course of his judgment,

(1) [1945] K. B. 376, 379, 380. (2) [1948] 1 K. B. 482.

pointed out that if there is a relative of the tenant who comes within the definition in para. (*g*), assuming "tenant" to cover a contractual tenant, and there is also someone in whom the contractual tenancy has vested under a grant of letters of administration or under a will, there will be, if the residing relative can claim to be a tenant under para. (*g*), two tenants, two persons presumably liable to pay the rent and entitled to occupation or possession of the house, and so on, and that that is really an impossible position which the legislature cannot have contemplated. Tucker L.J. said (1): "I think that the "true view is that, if possible, an interpretation must be given "to this paragraph which will not run counter to all existing "legal conceptions. There is no difficulty in finding such an "interpretation. The language is clearly applicable where the "deceased tenant was at the date of his death a 'statutory "'tenant.' Such a tenant cannot transmit his purely personal "right either by assignment or by will; accordingly on his "death there is nothing which can vest in any one, and, but "for para. (*g*), his widow or other member of his family residing "with him would be trespassers if they remained in occupation "of the premises. Whether para. (*g*) may apply in the case of "a contractual tenant on whose death no executor or adminis-"trator is ever appointed, it is not necessary to decide."

In my view, the reasons which led Tucker L.J. to that conclusion on the facts of that case lead also to the conclusion that this appeal must succeed. Mr. Davies argued for the defendants that, on his view, they ought to be regarded as becoming statutory tenants as at the date of the death. I think that at the outset there is a difficulty about that conception, because it is not suggested that death automatically ends the contractual tenancy. Nobody at that moment can know whether letters of administration may not be taken out, and, on any view, as it seems to me, the landlord who wishes to bring an end to the contractual tenancy which is subsisting at the time of the death ought to be able to serve a notice to quit in order to bring it to an end. I also think that if, as may happen in other cases—it has not happened here—letters of administration are taken out at a later period, exactly the same position arises as existed in *Thynne* v. *Salmon* (1). I think first, therefore, that the reasons which led Tucker L.J. to his conclusion really lead to the same conclusion in this case, although he kept the matter open. I think, however, that

(1) [1948] 1 K. B. 482, 488.

there is something to be said for the view that once the conclusion is reached, which I reach here, that the notice to quit as served on the President was a valid, effective and proper notice to bring the contractual tenancy to an end, it might be said that the case was actually covered by *Thynne* v. *Salmon* (1). There is, of course, the dissimilarity that it cannot be said that at any moment, even on Mr. Davies' argument, two tenants were liable for the rent, for the President of the Probate, Divorce and Admiralty Division clearly was not liable for the rent.

For these reasons I think that the reasoning in *Thynne* v. *Salmon* (1) leads to the conclusion that this appeal must succeed.

It seems to me that on the natural construction of s. 12, sub-s. 1 (*g*), the word " tenant " in the words which I have read should be restricted to cases in which there is no right of tenancy which can be left by will or descend on intestacy. That construction can be arrived at without difficulty, whereas the attempt to bring in cases where there was a contractual tenancy subsisting at the date of the death creates difficulties. Mr. Davies referred to the fact that in *Thynne* v. *Salmon* (1) an argument was based (it can be seen what it was) on the fact that, by the Rent Restriction Act of 1935, the words " dying " intestate " in the definition after the word " tenant " were removed. That argument was, no doubt, considered in *Thynne* v. *Salmon* (1), and I do not think that it can be raised now on the issue which we have to decide in the light of the decision in that case.

I think that this appeal should be allowed.

COHEN L.J. I agree that the question raised in this case, which was specifically reserved by my brother Tucker in his judgment in *Thynne* v. *Salmon* (1), is really covered by the reasoning which led him to his conclusion in that case. In the sentence which immediately follows the passage which my brother Somervell read, Tucker L.J. said (2): " It is in my " view sufficient to say that it " [s. 12, sub-s. 1 (*g*)] " cannot " apply where the tenancy which is vested in a contractual " tenant at his death has passed by will or on an intestacy " to some person other than his widow or member of his family " residing with him at the time of his death, but that it clearly " does apply where the deceased tenant was a 'statutory

---

(1) [1948] 1 K. B. 482, 488. (2) Ibid. 489.

C. A.

1948

SMITH v. MATHER

Cohen L.J.

" 'tenant' unable to transmit his statutory interest." It is true that my brother Tucker had not in mind the President of the Probate, Divorce and Admiralty Division when he talked of some other person. It seems to me, however, that there is logically no distinction for this purpose between the position of the President and the position of any other person in whom the tenancy is vested. It is quite plain that under s. 9 of the Administration of Estates Act, 1925, this tenancy vested in the Probate judge. It is not necessary to consider how far he incurred any liability in respect thereof. I should think, as my brother Somervell said, that he incurred no financial responsibility. Nevertheless, it seems to me that the property was vested in him, and that it is quite inconsistent with the property's vesting in him that there should be a statutory tenancy of it in the defendants. I also agree with my brother Somervell that the notice served on the Probate judge was valid. That being so, it seems to me impossible to hold that these defendants can claim protection under the Rent Restriction Acts. They are clearly not persons entitled within s. 12, sub-s. 1 (*f*), and equally, in my view, they are not entitled to the benefit of sub-s. 1 (*g*), since the property vested in the President on the death of the mother. I agree that the appeal should be allowed.

TUCKER L.J. Having listened to the arguments on both sides, I find it impossible to distinguish this case in principle from the decision of the majority of this court in *Thynne* v. *Salmon* (1), and I agree that the appeal succeeds.

Appeal allowed.

Solicitors for the landlords: *Neve, Beck & Co., for J. Frodsham & Sons, Prescot.*

Solicitor for the defendants: *Joseph Davies, St. Helens.*

---

(1) [1948] 1 K. B. 482.

Applied. WELCH *v.* NAGY. [1949] 2 All E.R. 868.

Applied. WELCH *v.* NAGY [1950] 1 K. B. 455

Applied. STAGG *v.* BRICKETT [1951] 1 K. B. 648

BOWNESS *v.* O'DWYER.

C. A.

1948

June 3, 4, 7, 8, 15.

Lord Greene M.R., Wrottesley and Evershed L.JJ.

Landlord and tenant—Furnished letting—Future rent reduced by rent tribunal—Limitation of rent by county court judge to enable tenant to recover past overpayments—Notice to quit—Tenant's claim to hold over as statutory tenant—Rent with which weekly payments for use of furniture to be compared—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*) *—Furnished Houses* (*Rent Control*) *Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2.

Where the tenant of a dwelling-house, to whom it was let furnished and on whom notice to quit has been served, claims to hold over as a statutory tenant under the Rent Restrictions Acts on the ground that the dwelling-house was not "bona fide let at "a rent which includes payments in respect of . . . . use of "furniture" as required by s. 3, sub-s. 2 (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939, in order to make the Acts applicable, the weekly payment attributable to the use of furniture must be compared with the original contractual rent in order to see whether it "forms a substantial portion of the whole "rent" as required by s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923.

Jozwiak v. *Hierowski* [1948] 2 All E. R. 9 followed, *J. & F. Stone Lighting & Radio Co.* v. *Levitt* [1947] A. C. 209 distinguished.

This is so even though in the course of the tenancy the future rent has been reduced by a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, and even though the county court judge has thereafter made an order under s. 9, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that part of the past rents should be repaid on the ground that the contractual rent was in excess of the normal profit.

APPEAL from the Clerkenwell county court.

The facts, which are fully stated in the judgment of the court, were briefly as follows: On January 6, 1946, the plaintiff as landlord let a furnished room in 54 Highbury Grove, N.5, to the defendant as tenant at a weekly rent of 30*s*. Early in 1947, the tenant applied to the Hackney, Islington and Stoke Newington Rent Tribunal for a reduction of the rent under s. 2 of the Furnished Houses (Rent Control) Act, 1946, and on February 19, 1947, the tribunal reduced the rent payable to 8*s*. a week as from the next rent day. The tenant then applied to the Clerkenwell county court for repayment of part of the past payments of rent as being in excess of the normal profit under the Increase of Rent and Mortgage Interest (Restrictions)

Act, 1920, s. 9, sub-s. 1, as amended by sch. I to the Act of 1939. The landlord counterclaimed for possession under a notice to quit given by him. The county court judge found the rent inclusive of normal profits to be 13*s.* 6*d.* a week of which 3*s.* 6*d.* was a weekly payment for the use of furniture and he ordered repayment of 46*l.* 5*s.* 0*d.* to the tenant. On the counterclaim he held the notice to quit to be invalid as being for the wrong day; but he also decided that for the purpose of s. 3, sub-s. 2 (*b*) of the Act of 1939, and s. 10 of the Rent and Mortgage Interest Restrictions Act, 1925 (1), the value of the use of furniture already fixed at 3*s.* 6*d.* must be compared with the original rent of 30*s.* with the result that the tenant was entitled to the protection of the Rent Restriction Acts. The landlord then gave the tenant a proper notice to quit and on September 19, 1947, began proceedings for possession which came before the same county court judge. He followed his previous decision that the 3*s.* 6*d.* had to be compared with the original rent of 30*s.*, so that the tenant was entitled to hold over as statutory tenant. The landlord appealed claiming that the sum of 3*s.* 6*d.* a week which was admittedly the part of the rent attributable to the use of furniture should be compared either with the reduced rent of 8*s.* a week or the 13*s.* 6*d.* a week fixed by the county court judge and that on either of these views the room was bona fide let at a rental which included payment for the use of furniture.

Heathcote-Williams and *H. I. Spence* for the landlord. There was no justification for comparing the admitted weekly value of the use of the furniture with the original contractual rent. In fact the tenant has never in the result paid more than 13*s*. 6*d*. a week and since the reduction of the rent by the rent tribunal came into force only 8*s*. a week.

---

(1) The Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2 (*b*) (replacing s. 12, sub-s. 2, proviso 1 of the Act of 1920) provides: "The principal "Acts shall not by virtue of this "section apply . . . . (*b*) save as "expressly provided in the said "Acts, as amended by virtue of "this section, to any dwelling-"house bona fide let at a rent "which includes payments in "respect of board, attendance "or use of furniture."

The Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1 (as amended by the first schedule to the Act of 1939), provides: "For the purpose of "paragraph (*b*) of sub-section 2 of "section 3 of the Rent and "Mortgage Interest Restrictions "Act, 1939 . . . . a dwelling-"house shall not be deemed to be "bona fide let at a rent which "includes payments in respect of "attendance or the use of furni-"ture unless the amount of rent "which is fairly attributable to the "attendance or the use of furni-"ture, regard being had to the "value of the same to the tenant, "forms a substantial portion of "the whole rent."

[Evershed L.J. As regards the rent found to have been payable by the county court judge, the only effect was that 16*s*. 6*d*. a week was recoverable from the landlord but it did not affect the fact that the rent was 30*s*. a week.]

An alternative view is that the rent tribunal acting under s. 2 of the Furnished Houses (Rent Control) Act, 1946, reduced the rent to 8*s*. a week as being the sum thought to be reasonable. Under the register provided for in s. 3 the reduced rent would be entered and under s. 4 rent in excess of this could not be lawfully required. How then can the price for the use of the furniture be comparable with the original rent of 30*s*.? Section 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, does not refer to "rent payable under the contract." It refers merely to the rent and the rent which the landlord is entitled to demand and which the tenant is liable to pay is only 8*s*. The material date for determining the status of the tenant is the date when the landlord seeks possession.

The result of the legislation, whether fortunate or unfortunate, is that the tribunal may effect de-control. The only rent to which the court can have regard is the rent which the landlord is entitled to charge, not the rent which he claimed to charge. They referred to *Prout* v. *Hunter* (1). A mere modification of the rent does not create a new tenancy.

[Lord Greene M.R. If you are right the rent tribunal cannot exercise what is meant to be a beneficent jurisdiction without dealing the tenant a very heavy blow.]

Is that very shocking? The tribunal has found that the precise proper rent of the premises is 8*s*. a week which includes 3*s*. 6*d*. for furniture. If the tenant paid that, he would never be within the Rent Restriction Acts at all. The landlord, demanded a rent of 30*s*. The tenant had the option of paying that extravagant rent with protection, or paying the rent he ought to pay, and not getting protection.

The county court judge had no jurisdiction to reduce rent under s. 9 of the Act of 1920. As soon as it appeared that 3*s*. 6*d*. was not a substantial part of 30*s*. the county court judge could only consider the standard rent. Otherwise he could turn a protected tenancy into an unprotected tenancy.

(1) [1924] 2 K. B. 736.

They referred to *Jozwiak* v. *Hierowski* (1) and *J. & F. Stone Lighting & Radio Co.* v. *Levitt* (2). In this case if the rent tribunal had reduced the rent to less than two-thirds of the rateable value, the result would have been to take the premises out of the Rent Acts, but it would have been a result, not an exercise, of their powers. *W. H. Brakspeare & Sons, Ld.* v. *Barton* (3), *Phillips* v. *Hallahan* (4), *Gidden* v. *Mills* (5), *Leslie & Co., Ld.* v. *Cumming* (6), *Thompson* v. *Rolls* (7) were cited.

[When the hearing was resumed after the week-end adjournment, counsel on both sides informed the court that it had just come to light that the landlord had been accepting rent eo nomine from the tenant since judgment. After some discussion the court adjourned argument on this point, which had taken both sides by surprise, and the effect of which on the appeal was not without difficulty, and the main argument was resumed.]

The effect of *Jozwiak* v. *Hierowski* (1) is that the status of the dwelling-house is fixed when the contract is entered into " for " the duration of that particular contract." But there is no ground for distinguishing this case from the numerous cases in which this court and the House of Lords have held that the material date is the date when the landlord seeks to enforce his rights. Having received back the rent over 13*s*. 6*d*. the tenant cannot now be heard to say for any purpose that the rent is 30*s*.

[EVERSHED L.J. May he not say that this is a continuation of the existing contract with an alteration of the rent recoverable ?]

The whole test under the Rent and Mortgage Interest Restrictions Act, 1939 is whether the premises are taken out of the protection of the Rent Restriction Acts by being " bona " fide let at a rent which includes payments in respect of " . . . . use of furniture."

[LORD GREENE M.R. The expression " bona fide " must relate to the psychological state of the landlord's mind and that must surely be at the time when he enters into the contract. The test whether it is a furnished or unfurnished letting must also be tied to some time which must, it would seem, be the time when the contract was entered into.]

---

(1) [1948] 2 All E. R. 9.
(2) [1947] A. C. 209.
(3) [1924] 2 K. B. 88.
(4) [1925] 1 K. B. 756.
(5) [1925] 2 K. B. 713.
(6) [1926] 2 K. B. 417.
(7) [1926] 2 K. B. 426.

The sole issue here is not what the position was under the original contract but what it is under the contract as modified. Can the tenant claim to retain the position of statutory tenant or not?

A "bona fide" letting means a real and not a sham letting. The expression was originally put in to prevent a letting with an illusory amount of furniture. (*Ebner* v. *Lascelles* (1) *Conqueror Property Trust* v. *Barnes Corporation* (2), *Maclay* v. *Dixon* (3) and *Fordree* v. *Barrell* (4) were cited.)

[Lord Greene M.R. Whether you regard "bona fide" objectively as a quality of the letting, or subjectively as a state of mind of the landlord, it seems difficult to attach it to any time except the making of the contract.]

We submit that the proper date is the date when the tribunal made their decision, which effected either an amendment of the original contract, or the formation of a new contract. The tenant having accepted repayment, the new rent must be treated as written into the old contract. The 30*s*. is gone, and must be wrong. The right figure is either 8*s*. because that is, what the 1946 Act says is payable under the contract, or 13*s*. 6*d*. which the county court judge arrived at.

Magnus for the tenant. *Jozwiak* v. *Hierowski* (5) really concludes this case so far as this court is concerned. It makes it clear consistently with other cases, such as *Property Holding Co., Ld.* v. *Mischeff* (6) that the material time is that of entering into the bargain. The status of the tenant and that of the dwelling-house must be ascertained as at the date of the contract. Section 7 of the Furnished Houses (Rent Control) Act, 1946, furnishes the liaison between that Act and the Rent Restrictions Acts by excluding the application of ss. 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, so far as regards the future after a decision of the rent tribunal. A rent tribunal cannot reduce the rent below the standard rent: *Rex* v. *Paddington and St. Marylebone Rent Tribunal* (7). If they could by reducing rent remove protection from a tenant, they would be affecting the Rent Restrictions Acts in a manner expressly excluded by s. 7 of the Act of 1946. That Act empowers interference with rent, not interference with security of tenure.

(1) [1928] 2 K. B. 486, 497.
(2) [1944] K. B. 96.
(3) (1943) 170 L. T. 49.
(4) [1931] 2 K. B. 257.
(5) [1948] 2 All E. R. 9.
(6) [1948] A. C. 291.
(7) [1947] K. B. 984, 988.

[WROTTESLEY L.J. May not an act of the tribunal affect tenure. Section 7 does not say "Nothing done by this Act" but "nothing in this Act."]

The jurisdiction conferred on the rent tribunal is not to substitute a reduced rent but merely to limit the amount recoverable just as under s. 9 of the Act of 1920. The time at which to relate payment for use of furniture with the total rent is the date when the contract is made. On grounds of public policy and for every reason it is the rent charged by the landlord that has to be tested. The words "bona fide" as used in s. 3, sub-s. 2 (*b*), of the Act of 1939, which replaced the same words in s. 12, sub-s. 2, proviso (I.) of the Act of 1920, are explained by s. 10, sub-s. 1, of the Act of 1923. The rent fixed by the county court judge under s. 9, sub-s. 1, of the Act of 1920 is of no importance for the present purpose. He was dealing only with past rent and fixing a notional rent for the past. It can have no bearing on the present question. That the county court judge could only deal with past rent under s. 9 is made clear by s. 7 of the Act of 1946.

H. I. Spence replied.

Cur. adv. vult.

June 15. The judgment of the court was read by EVERSHED L.J., who after stating the terms of the original lettings, said: We have not been told the details of the furniture, but it has been agreed before us by both the landlord and the tenant that the proper weekly sum attributable to the use of the furniture is and was at all material times 3*s*. 6*d*., being the figure fixed by the county court judge in certain proceedings later mentioned. It has accordingly been conceded by the landlord that the portion of the contractual rent, namely, 30*s*. per week, which was attributable to the use of the furniture was not a "substantial portion of" this whole rent within the terms of s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923; so that the premises were not on these facts excluded from the general protection of the Rent Acts by virtue of the first proviso to s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or of s. 3, sub-s. 2 (*b*), of the Rent and Mortgage Interest Restrictions Act, 1939. But in the beginning of the year 1947 the tenant applied to the Hackney, Islington and Stoke Newington Rent Tribunal established under the Furnished Houses (Rent Control) Act, 1946, for a reduction of the rent pursuant to the

Act. It is to be observed that by s. 2, sub-s. 1, of the Act of 1946 its provisions appear to apply to any contract of letting in respect of premises in a district to which the Act applies (as it did in this case), where the rent payable includes payment for the use of furniture, notwithstanding that the portion of the whole rent attributable to the use of the furniture is not sufficiently substantial to exclude the premises from the general protection of the Rent Acts. The Hackney, Islington and Stoke Newington Rent Tribunal, on the tenant's application, exercised its powers under s. 2, sub-s. 2, of the Act of 1946 by reducing " the rent payable under the contract " to 8*s.* per week It has been assumed (though not proved) that the local authority duly entered in the register required to be kept by s. 3 of the Act of 1946 the particulars required by that section, including the reduced rent of the premises, as fixed by the tribunal : and on that footing it became thereafter unlawful for the landlord to demand for the premises any rent in excess of 8*s.* per week. There is, however, no power in the Act of 1946 for the tribunal to order repayment of past payments of rent in excess of the figure fixed by it : in other words, the scheme of the Act appears to be that the tribunal has power to alter the existing contract for the future, but not retrospectively, by reducing the rent payable under the contract.

Not content with his performance before the Hackney, Islington and Stoke Newington Rent Tribunal, the tenant then proceeded to apply to the county court under s. 9 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by sch. I. to the Act of 1939). The material words of sub-s. 1 of this section, as amended, are as follows : " Where any person lets . . . . any dwelling-house to which " this Act applies, or any part thereof, at a rent which includes " payment in respect of the use of furniture, and it is proved to " the satisfaction of the county court on the application of the " lessee that the rent charged is yielding or will yield to the " lessor a profit in excess of the normal profit as hereinafter " defined, the court may order that the rent, so far as it exceeds " such sum as would yield such normal profit shall be " irrecoverable, and that the amount of any payment of rent " in excess of such sum which may have been made in respect " of any period after the passing of this Act "—that is the Act of 1939—" shall be repaid to the lessee." The landlord (who had previously served a notice to quit upon the tenant) counterclaimed for possession. On this application (which is not the subject of the present appeal and in respect of which there was in fact no appeal) the county court judge purporting to exercise the powers conferred by s. 9 of the Act of 1920 (as amended) held that "normal profit" in respect of the premises (including the use of the furniture) was 13*s*. 6*d*. per week and ordered accordingly that all sums previously paid by the tenant for rent in excess of that sum (which amounted to 46*l*. odd) should be paid by the landlord to the tenant. Upon the counterclaim the learned judge held that the landlord's notice to quit was invalid, so that the counterclaim failed on that ground; but he also went on to decide that 3*s*. 6*d*. per week being the amount properly attributable to the use of the furniture, this figure must (in accordance with a previous decision of his own in *Lambert* v. *Keating* (1)) be related for the purposes of s. 10 of the Act of 1923 not to the reduced rent of 8*s*. per week fixed by the Hackney, Islington and Stoke Newington Rent Tribunal, nor to the figure of normal profit (videlicet 13*s*. 6*d*. per week) which he had himself determined, but to the original contractual rent of 30*s*. per week; and that the premises were not accordingly excluded from the general protection of the Rent Acts by virtue of proviso 1 to s. 12, sub-s. 2, of the Act of 1920, or by s. 3, sub-s. 2 (*b*), of the Act of 1939.

As I have said, there was no appeal from this decision and the landlord in fact repaid, or accounted to the tenant for, the full sum of 46*l*. odd which the county court judge held to be repayable by her to the tenant. The landlord, however, served on the tenant a fresh notice to quit admittedly, on this occasion, valid and effectual to determine the contractual tenancy; and then proceeded to bring a second action for possession before the same county court judge alleging that in the circumstances above narrated the premises were at the date of the service or expiry of such notice outside the protection of the Rent Acts. In these proceedings the landlord alleged that having regard to the order of the Hackney, Islington and Stoke Newington Rent Tribunal reducing the rent payable under the original contract of tenancy to 8*s*. per week or (alternatively) to the decision of the county court judge fixing the "normal profit" of the premises at 13*s*. 6*d*. per week, the weekly amount attributable to the use of the furniture (namely, 3*s*. 6*d*. per week) was a substantial portion of the rent payable at the date of the service or expiry of the notice and, accordingly, that the premises were outside the protection of the Rent Acts under the provisions of those Acts already quoted. The learned county court judge, however, in his judgment delivered on October 28, 1947, following his previous decision in the earlier action between the same parties and following also the judgments of this court in *Palser* v. *Grinling* (1), adhered to his view that the weekly sum attributable to use of the furniture had to be related to the original contractual rent of 30*s*. per week and that accordingly the premises were not shown to be excluded from the general protection of the Rent Acts. It is from this decision that the landlord has appealed to this court.

---

(1) Unrep.

We have been informed that since the date of this judgment the landlord has in fact accepted rent from the tenant at the figure of 8*s*. per week: and Mr. Magnus has argued that this fact is in any event fatal to the appeal on the ground that by so accepting rent the landlord must either have affirmed the existence of a contractual tenancy between herself and the tenant or be taken to have assented to the tenant's claim to be a statutory tenant of the premises—both alternatives being wholly inconsistent with the landlord's contention that the tenant is a trespasser in respect of the premises in question. On the view that we take it is unnecessary to express any opinion on this point. A number of other interesting questions have been argued before us by Mr. Heathcote-Williams for the landlord but on many of them it is also unnecessary to express any opinion. It is, in our judgment, sufficient to say that the learned county court judge was correct in the view that he took of the proper date at which it is necessary to relate the weekly amount attributable to the use of the furniture (that is, admittedly 3*s*. 6*d*.) to the total rent payable. It is to be observed that the proviso to s. 12, sub-s. 2, of the Act of 1920 (and equally s. 3, sub-s. 2 (*b*), of the Act of 1939) refers to premises "bona fide let at a rent which includes payments in "respect of . . . . use of furniture." Now the formula "bona fide let" etc., seems to us prima facie to import a test as to the state of mind (at least) of the landlord and the only time at which such an inquiry can usefully be made is the time when the contract of letting was made. Further by s. 10 of the Act of 1923 it is necessary to take into account the value of the furniture *to the tenant* in estimating the sum fairly attributable to the use of the furniture. It is obvious that changes in the identity and the circumstances of the tenant no less than the effect of the passage of time on the furniture itself may cause from time to time considerable fluctuations in the "value to "the tenant" of the furniture: and it would therefore appear that unless the ratio of the value of the furniture to the total amount of the rent is fixed once and for all at the time when the contract of tenancy is made, the application from time to time of the Act to any premises which have been let together with the use of furniture must be subject to great uncertainty.

---

(1) [1946] K. B. 631.

But in any case our task on this question has been much simplified for us by the very recent decision of this court in the case of *Jozwiak* v. *Hierowski* (1). In that case the same point arose and in the course of delivering the judgment of the court Asquith L.J. said at p. 10 of the report: "We are "further of opinion that the relevant date on which to compare "the part of the rent attributable to the use of furniture with "the whole rent is the time when the original contract of "tenancy was made. In *Property Holding Co. Ld.* v. *Mischeff* (2) "in the Court of Appeal, where the rent was raised from 275*l.* "to 375*l.* in the last six months of the tenancy, that court "assumed (and on this point was not questioned by the House "of Lords) that the original figure was the material one, though "it happened that for the purpose of that case it did not matter "which." Then the learned Lord Justice takes an example as to which, as has been pointed out, there may have been a slip in the language used. He then says: "To take any "other date would create serious inconvenience and un-"certainty."

It is true that the general rule under the Rent Acts is that the status of any premises, for the purpose of the Acts, should be determined at the date when the landlord seeks to enforce his rights. In this connexion Mr. Heathcote-Williams strongly relied upon the decision of the House of Lords in the case of *J. & F. Stone Lighting & Radio Co.* v. *Levitt* (3). In that case, so far as material, the question was at what date the application should be considered for the purpose of s. 12, sub-s. 7, of the Act of 1920 in order to determine whether or not the rent payable in respect of the premises in question was less than two-thirds of their rateable value: and the House of Lords held the answer to be "at the time when the landlord sought to "enforce his rights'." This case does not appear in fact to have been cited in this court in the case of *Jozwiak* v. *Hierowski* (1),

(1) [1948] 2 All E. R. 9.
(2) [1946] K. B. 645.
(3) [1947] A. C. 209.

though it is clear that the decision of the House of Lords was published some time before the argument in the former case was heard. But in our judgment the opinions in the *Stone Lighting & Radio Co.* case (1) which related to the provisions of s. 12, sub-s. 7, of the Act of 1920, cannot in any event be regarded as authority upon the proper construction of the very different language of s. 12, sub-s. 2, of the same Act. Moreover, to say that the status of the premises must be determined at the time when the landlord seeks to enforce his rights is in any event not to answer the argument in Mr. Heathcote-Williams' favour: for it does not follow that the status of the premises at that date, as regards the proportion of the value of the furniture to the total rent, is not to be determined by reference to the time when the tenancy was created. In any event the case of *Jozwiak* v. *Hierowski* (2) is an authority which binds this court and which we are bound to follow. We add that even were this not so, it seems to us that the landlord would be faced with a serious difficulty under the terms of s. 12, sub-s. 6, of the Act of 1920, but in the circumstances we express no view on the effect of this somewhat enigmatic provision.

Mr. Heathcote-Williams finally sought to escape from the effects of *Jozwiak* v. *Hierowski* (2) by arguing that, having regard to what occurred on the previous hearing before the county court judge, the tenant was disentitled to assert that the rent of the premises in question was in fact 30*s*. per week at any material date. To make good this point Mr. Heathcote-Williams contended either that the earlier judgment (assuming it to have been valid and effectual) substituted for all purposes the rent of 13*s*. 6*d*. per week for the original figure of 30*s*. per week; or that (assuming the judgment to have been pronounced without jurisdiction) the parties had so acted that the tenant was now estopped from asserting that the rent had at any time been 30*s*. per week. As regards the first part of the argument it is in our judgment clear from the terms of s. 9 of the Act of 1920 (which we have quoted above), that an order made thereunder does not have the effect of substituting some other figure for the figure of rent provided by the contract. At most, so much of the contractual rent as exceeds the "normal "profit" is held to be irrecoverable. As regards the second branch of the argument it is unnecessary to express a final opinion on the question whether the county court judge had in

(1) [1947] A. C. 209.

(2) [1948] 2 All E. R. 9.

fact jurisdiction to make the order which he did under this section. It was forcibly argued that on the general scheme of the Acts s. 9 was only intended to apply to premises let at a rent which includes payment in respect of the use of furniture where the effect of such a letting is (by virtue of the proviso to s. 12, sub-s. 2, of the Act of 1920 as amended by s. 10 of the Act of 1923), to exclude them from the general protection of the Acts; for unless this is so it is difficult to see how the provisions of s. 9 of the Act of 1920 as regards normal profit can be made to fit into the provisions of the same Act as to standard rent. We express no final opinion on this point. But in any case once there had been a registration (as we assume there has been in the present case) pursuant to the Furnished Houses (Rent Control) Act, 1946, in respect of any premises, the rent payable in respect whereof has been reduced under that Act, s. 7 of that Act excludes the application of s. 9 of the Act of 1920 as regards the rent of those premises in respect of any period after the registration. We may add that the latter part of s. 7 of Act of 1946 lends no little support (as argued by Mr. Magnus) to the view that an order made under that Act reducing the rent payable under a contract of letting cannot have the effect of taking outside the general protection of the Rent Acts premises which prior to the making of the order had been within such protection. The language referred to in s. 7 is this: "but save as aforesaid nothing in this Act shall affect any "provisions of the Rent and Mortgage Interest Restrictions "Acts, 1920 to 1939." Assuming however (without deciding) that the previous order of the county court judge was made without jurisdiction, it is nevertheless impossible, in our judgment, to say that what the parties did pursuant to the judgment gives rise to any estoppel against the tenant. By acting in accordance with the judge's directions it is possible that (following in this respect the case of *J. & F. Stone Lighting & Radio Co.* v. *Levitt* (1) already referred to) landlord and tenant might have been held to have made a new contract on the terms implicit in those directions: but in the present case such a conclusion is negatived by the fact that the rent paid and received after the judgment was not the sum which the county court judge specified as the normal profit but the figure of 8*s.* per week which the Hackney, Islington and Stoke Newington Rent Tribunal had previously fixed. In any case we cannot see in anything which the landlord or the tenant did following

(1) [1947] A. C. 209.

the judgment any of those elements necessary to establish an estoppel—any representation made by the tenant to the landlord and acted upon by the landlord which would disentitle the tenant from proving as a fact the truth that the rent fixed originally by the contract was the sum of 30s. per week. We may add with regard to our general conclusion that a contrary view would mean that the tenant of a furnished dwelling within the Act of 1946 is being invited to apply for a reduction in his rent under that Act and the tribunal is being empowered to grant it without either of them being warned by the legislature that the result may be the destruction of the tenant's security of tenure under the Rent Acts.

In our judgment, therefore, the learned county court judge was right and this appeal fails.

Appeal dismissed.

Solicitors: *Markham Thorp & Co.; J. S. I. Rabin.*

H. C. G.

QUAINTWAYS RESTAURANT LD. *v.* BUDD.

1948
Apr. 8.

Lord Goddard C.J., Humphreys and Pritchard JJ.

Emergency legislation—Food rationing—Cheese and fats—Catering establishment—Use of excess quantity of rationed goods during rationing period—Cheese and fats processed to prevent deterioration—Whether "used" in contravention of order—The Fats, Cheese and Tea (Rationing) (No. 2) *Order,* 1946 (*St. R. & O.* 1946, *No.* 1116), *arts.* 8 *and* 10.

Articles 8 and 10 of the Fats, Cheese and Tea (Rationing) No. 2 Order, 1946 (St. R. & O. 1946, No. 1116) provide that the amount of fats and cheese which may be used during a particular rationing period in a catering establishment shall not exceed a specified amount "per person per meal served in or by the "catering establishment." In order to prevent the deterioration of accumulated stocks of fats and cheese, the appellants, a registered catering establishment, processed quantities of fats and cheese in excess of the amounts they were permitted to use during certain specified rationing periods into articles of food which would keep in store in air tight containers. None of the articles so produced was served in the restaurant during the rationing periods concerned.

Held that the appellants had "used" the excess quantities of fats and cheese in the specified periods and were therefore guilty of offences against the order.

Case stated by justices.

Three informations were laid by the respondent, E. G. Budd, a food executive officer, against the appellants, Quaintways Restaurant Ld., a duly licensed catering establishment. The first information alleged that in the eight-weekly rationing period from February 2, 1947, to March 29, 1947, the appellants did use in their establishment a total quantity of cheese in excess of the total quantity of such food permitted to be used in or by the said establishment contrary to art. 10 of the Fats, Cheese and Tea (Rationing) (No. 2) Order, 1946 (St. R. & O. 1946, No. 1116) (1). The second and third informations alleged that during the above mentioned rationing period and also during the period from March 30, 1947 to May 24, 1947, the appellants had used in their establishment a total quantity of fats in excess of the total quantity permitted to be used in or by the establishment contrary to art. 8 of the order as amended (in regard to the quantities permitted) by the Fats, Cheese and Tea (Rationing) (No. 2) (Amendment No. 3) Order dated November 30, 1946 (St. R. & O. 1946, No. 2025).

Upon the hearing of the informations the following facts were proved: During the rationing period ending on March 29, 1947, one hundred and ninety-six pounds of cheese over the amount permitted to be used in the period was taken from the appellants' stores and the greater portion thereof was processed in the kitchen of the appellants' restaurant. During the rationing periods ending March 29 and May 24, 1947, respectively, two hundred and forty-five and one hundred and eighty-three pounds of fats over the permitted amounts were taken from the appellants' stores and processed in the kitchen of the restaurant. Before the rationing periods in question, owing to the diminution in trade due to the fuel crisis, the appellants' stocks of fats and cheese had accumulated, despite the cancellation by them of supplies thereof from their suppliers. The stocks had deteriorated in quality and were becoming, as to a substantial portion, rancid and inedible and accordingly instructions were given by the appellants to their kitchen staff to process so much of the cheese and fats as was not unfit for human consumption into Welsh rarebit mixture, cheese savouries, puffs and straws, biscuit base, soufflé base, puff paste and similar articles, which would keep in store in airtight containers. The quantities of cheese and fats used in the preparation of the articles specified were not included by the appellants in the returns of stock at the end of the rationing periods in which they were prepared but not consumed; nor were they taken into consideration by the appellants in calculating the quantities permitted to be used during any subsequent rationing periods calculated in accordance with arts. 8 and 10 of the order. The appellants did not obtain the consent of the Minister of Food to the processing of the fats and cheese. It was contended for the appellants that they had not "used" the fats or cheese within the meaning of the order inasmuch as they had not been consumed by persons at, or during, or with meals in the restaurant during the specified rationing periods and that (with the exception of a small portion which was unfit for human consumption and had to be destroyed) the fats and cheese had merely changed their shape and appearance and still remained in the stock and custody of the appellants. For the respondent it was contended that the use of the fats and cheese in the preparation of the articles specified constituted a use of the fats and cheese within the meaning of the terms of the order. The justices found that the offences alleged against the appellants were proved and fined them 5*l.* on each of the three informations and ordered them to pay the sum of five guineas as special costs. The appellants appealed.

---

(1) The Fats, Cheese and Tea (Rationing) (No. 2) Order, 1946 (St. R. & O. 1946, No. 1116), art. 8 (as amended by St. R. & O. 1946, No. 2025): "The total quantity "of fats which may be used in "any specified period—(*a*) in "any catering establishment . . . . "shall not exceed an amount "calculated at the rate of $\frac{1}{4}$ ounce "in total amount (but so that "not more than $\frac{3}{7}$ of such amount "shall be butter and not more than "$\frac{1}{7}$ of such amount shall be cooking fats) per person per meal "served in or by the catering "establishment . . . ."

Article 10: "The total quantity "of cheese which may be used in "any specified period—(*a*) in "any catering establishment; . . . . "shall not exceed an amount "calculated at the rate of $\frac{1}{14}$ ounce "per person per meal served in or "by the catering establishment . . . ."

P. Curtis for the appellants. The justices were wrong in holding that the appellants had "used" the cheese and fats within the meaning of the words of the order. No part of the cheese and fats was supplied in the restaurant during the rationing periods in their altered condition. "Used" in the order means used in the supply of meals during a particular period since arts. 8 and 10 both refer to the amount served "per person per meal," thus clearly indicating that the amount of fats and cheese which the appellants were entitled to use was solely based on the number of meals served in the

1948

QUAINTWAYS RESTAURANT LD. v. BUDD.

restaurant, and " used " in the order is, therefore, equivalent to " consumed." All that the appellants did was to salvage deteriorating commodities for future use and to say that they had " used " the fats or cheese would be to give a strained meaning to the word.

H. L. Parker for the respondent. The justices were right in holding that the fats and cheese had been " used." The smallness of the fines they imposed indicates that in their view the offence committed was a technical one, but the matter is one of considerable importance from the point of view of the Ministry of Food, because, if the appellants are right in their contention that " used " must be read as meaning " consumed," the whole system devised for checking the quantities of commodities used breaks down. " Used " is a very general word meaning " employed for a purpose." In the ordinary sense of the word cheese and fats are " used " if they are made into such articles as were produced by the appellants in the present case and there is no reason why it should be given the narrower meaning of " consumed."

P. Curtis in reply.

LORD GODDARD C.J.: Very large amounts of cheese and fats were involved in the offences alleged in the present case and the fact that the justices only fined the appellants 5*l*. on each information shows that, in their opinion, only a technical offence had been committed and that there was nothing against the character of the appellants in the sense that there was any moral blame attaching to them. There seems to be no doubt that, in the view of the justices, the appellants acted from the best possible motives with the object of preserving food instead of letting it go bad, and I dare say that they feel very much aggrieved that the only thanks they received for their action, which did in fact preserve a quantity of food, should be a prosecution. On the other hand, as Mr. Parker pointed out, it is obvious that if what the appellants did was allowed a loophole would exist in the order of which advantage might be taken. It may fairly be said that the result of the present case is only this: an offence has been committed: the appellants did not commit that offence with any evil intent of exceeding their ration or of infringing the order, but none the less a prosecution was necessary to show that such a thing must not happen again. [His Lordship referred to the terms of arts. 8 and 10 of the order, and continued :]

Mr. Curtis argued for the appellants that the word "used" in the articles must mean "consumed," and consumed in the catering establishment. I do not think that the court can say that in an order of this nature the word "used" is equivalent to "consumed," because those who carry on catering establishments often use fats for making up other articles and cheese can be similarly employed. If Welsh rarebit or cheese savouries are made and cheese is an ingredient of them (as one hopes it would be!) the result must be that the cheese "has been used" to make up other things. The words "per person per meal" in the order were strongly relied on by Mr. Curtis in support of his argument that "used" means consumed in the restaurant, but I think that if a fair view is taken of the whole of the article, those words only show that the number of meals served in the restaurant is the yardstick by which the use of the fats or cheese is to be measured. I think it is impossible to construe the word "used" as meaning "consumed" because a person may use fats or cheese in a particular rationing period without consuming them. If, for instance, fats have been used in the making of pastry or cake, it would not be possible to say that the person making the pastry or cake still has the fat in stock because the pastry or cake has not been consumed. I think that the word "used" must be given its ordinary meaning and that the order prohibits the use of fats or cheese in the restaurant beyond the specified amount, for any purpose. For these reasons I think that the justices came to a correct decision and that this appeal must be dismissed.

HUMPHREYS J. I agree and have nothing to add.

PRITCHARD J. I agree.

Appeal dismissed.

Solicitors for the appellants: *L. Bingham & Co., for Ouseley-Smith & Co., Chester.*

Solicitor for the respondent: *The Treasury Solicitor.*

P. B. D.

C. A.

1948
June 8, 9.

Lord Greene M.R., Wrottesley and Evershed L.JJ.

R. F. FUGGLE LIMITED *v.* GADSDEN.

Landlord and tenant—Rent restriction—Dwelling-house required by landlord for person engaged in his whole-time employment—Commencement of work delayed by illness of employee—Effect—Termination of employment between hearing in county court and hearing of appeal—Whether to be considered—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32, *s.* 3, *sub-s.* 1 *and sch. I.* (*g*).

Where a landlord claims possession of a dwelling-house under para. (*g*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 on the ground that it is reasonably required for the occupation of a person in his whole-time employment, it is sufficient (the other requirements being complied with) to show that the date for the employee to start work under the contract has arrived before the hearing, and it is immaterial that, by reason of illness, he has not in fact begun to work.

Where a county court judge has found on sufficient evidence that it is reasonable to make an order for possession, the Court of Appeal will not take into consideration facts, such as the termination of the employment, arising since the hearing, or remit the case to the county court judge for reconsideration in the light of such facts.

APPEAL from Watford county court.

The defendant Jeffrey Gadsden was the tenant of a dwelling-house known as Glenleith, London Road, Bushey Heath, from the plaintiffs R. F. Fuggle Ld. at a rent of 1*l*. a week. The house was let to the defendant in consequence of his employment by the plaintiffs, and he continued in occupation after his employment had ceased. On July 25, 1947, notice to quit was given to the defendant, as the plaintiffs wanted the house for a man named Wilson with whom they had originally contracted to employ him conditionally on vacant possession of the house becoming available. On August 9, 1947, the plaintiffs began the present proceedings for possession. On September 3, Wilson gave notice to his existing employers, and in view of the risk that he might become subject to an anticipated Control of Engagement Order the plaintiffs engaged him unconditionally to start work on September 10. On September 7, Wilson was taken ill, and had to undergo an operation, and had not sufficiently recovered at the date of the hearing in the county court to begin work, though he was still under contract to do so as soon as he could. The hearing in the county court took place on October 1 and October 22, 1947. On October 29, His Honour Judge Done, in a reserved judgment, held that the premises were reasonably required by the plaintiffs, but that he was bound by observations in *Benninga (Mitcham), Ld.* v. *Bijstra* (1), to hold that, as Wilson had not yet commenced work, he was not "engaged in the "whole-time employment" of the plaintiffs; he therefore dismissed the plaintiffs' claim to possession, on the ground that they had failed to bring themselves within para. (*g*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (2). The plaintiffs appealed.

On October 30, Wilson commenced work, but he left the plaintiffs' employment on November 5, 1947, so that at the date of the hearing of the appeal on June 8 and 9, 1948, the house was no longer required by the plaintiffs for his occupation.

Maurice Lush for the plaintiffs. The county court judge expressly found that it would be reasonable to make an order. The case of *Benninga (Mitcham), Ld.* v. *Bijstra* (1) which he thought precluded him from doing so, is distinguishable; in that case the man for whom the premises were required was still bound by contract to his old employers, and was not free to start work for the plaintiffs. The effect of that case is that an engagement for employment in future is not sufficient to satisfy the Act. It does not say that the Act is not satisfied where there is a presently existing obligation to work, but by some fortuitous circumstance, such as illness, work has not actually been commenced on the contractual date.

The court should be apprised of the fact that Wilson, for some reason of which I am unaware, left the plaintiffs' employment very shortly after he began, on the day after the judgment, to work for them. It is submitted that this is immaterial, and that this court will not, and indeed cannot, have regard to

(1) [1946] K. B. 58.

(2) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I.: "A court "shall, for the purposes of s. 3 "of this Act, have power to make "or give an order or judgment for "the recovery of possession . . . . "without proof of suitable alternative accommodation (where "the court considers it reasonable "to do so) if . . . .(*g*) the dwelling-"house is reasonably required "by the landlord for occupation "as a residence for some person "engaged in his whole-time "employment . . . ."

new facts arising after the judgment under appeal. Were it to do so, there would be no finality in litigation.

The defendant did not appear, and was not represented.

LORD GREENE M.R. In the action in which this appeal is brought the plaintiff sought to obtain possession of a dwelling-house on the ground that he "reasonably required" it "for "occupation as a residence for some person engaged in his "whole-time employment." I take those words from the relevant part of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, in para. (*g*) of sch. I. to that Act. That paragraph deals with one of the cases where the court is empowered to make an order without proof of alternative accommodation. Certain conditions must be fulfilled; thus (1.) it must be reasonable to make the order; (2.) the dwelling-house must be reasonably required for the occupation stated; (3.) it must be shown that the tenant was in the employment of the landlord or of the former landlord when the dwelling-house was let to him.

Those are for present purposes the relevant conditions. All those conditions the county court judge held to be fulfilled, and he would have made the order for possession but for a point of law as to which he conceived himself to be bound by what he understood was the effect of the observations made by the Lords Justices in the case of *Benninga* (*Mitcham*), *Ld.* v. *Bijstra* (1). These observations which the county court judge followed relate to the words which I have read in para. (*g*), "some person engaged in his whole-time employment," and the judge came to the conclusion that the person for whom possession was sought could not be properly described as engaged in the whole-time employment of the appellants.

The facts were these. The man, who was called Wilson, was engaged by the plaintiffs to enter their employment. The house had previously been occupied by a man in their employment who left in July, 1942. On July 25 the defendant and his wife went into occupation under a contract of tenancy which the county court judge found was a contract with the defendant and not with his wife. The defendant's occupation and employment was such as to bring para. (*g*) into operation.

On July 11, 1947, the plaintiffs engaged Wilson to enter their employment. The first arrangement apparently was an engagement conditional on accommodation being found for him,

(1) [1946] K. B. 58.

but having regard to the coming into force of the Control of Engagement Order the plaintiffs changed that arrangement and engaged Wilson on a firm engagement. He was engaged to start work on September 10, 1947. By that time he had freed himself from his previous occupation. Unfortunately, three days before September 10, when he was due to enter his employment, he was taken ill; he had to have an operation for mastoid, and, although he gave evidence at the hearing, he was not quite fit to begin work.

There was no suggestion at the hearing, apparently, nor did the judge take the view, that by reason of his inability to start his work on the date agreed, namely, September 10, the contract had in any way been determined. The parties never suggested that the contract was determined, and they did not act on that footing. In point of fact Wilson began work on October 30.

The hearing began on October 1, and was adjourned to October 22. The county court judge delivered judgment on October 29. He dismissed the claim on these grounds, and perhaps I had better look at his own words. After having referred to the observations in this court in the *Benninga* case (1), he said this: "I feel it right to follow the "opinions expressed by the Lords Justices in that case. "It seems to me that the paragraph"—that is the paragraph containing the words I have quoted, "engaged in "his whole-time employment"—"gives two alternative "conditions, with which the landlord must comply. Either "the man at the date of the hearing must be a person engaged "in his whole-time employment, or, if not engaged in his whole-"time employment, he must be a person with whom a contract "for such employment has been entered into, that is to say, "a contract conditional on housing accommodation being "provided."

That latter limb of para. (*g*) I did not read because it is not relevant to this case. It would have been relevant if the original arrangement had stood, but, as I have said, that was altered in view of the Control of Engagement Order.

The county court judge goes on to say this: "It seems to "me that, if the man is not working but a contract for employ-"ment was made with him, that is not enough unless it is a "contract of a particular kind, namely, a conditional contract "of this nature. The alternative to that is a person actually "engaged in employment; that is to say, not only under

(1) [1946] K. B. 58.

C. A.

1948

R. F. FUGGLE LD. v. GADSDEN.

Lord Greene M.R.

"contract, but working." I do not think I need read more. That appears to me to make quite clear what was passing through the judge's mind. He reads the words "engaged in "his whole-time employment" as referring to a man who is not merely under contract but who is actually working at the relevant date.

The position with Wilson was this. He was not, at the relevant date, the date of the hearing, under contract to anybody else. He was under contract with the plaintiffs. Under that contract he was bound to begin his work on September 10. Had the matter stood there there is no question but that the county court judge would have made the order. The only reason why he did not make the order was that the man was not physically able to commence work on September 10. In my opinion that is a misreading of the language of the section. The language of the section, in my opinion, is satisfied in a case where there is a contract for services, and the date thereby fixed for the commencement of the services has already arrived at the time of the hearing. If the date for the commencement of the services arrives at some future date, the observations in this court on which the county court judge relied would no doubt apply, because in that case that is actually what happened.

Though we shall presently see the difference between the two cases, I may, very shortly, refer to the facts in that case. The plaintiffs were alleging that they required the premises for a man called Schuler who, they said, was a workman engaged in their whole-time employment. They arranged with Schuler to come into their employment in February, 1945; but that was not an arrangement or a contract for the immediate beginning of work, for the very simple reason that Schuler was under a contract with somebody else, and that contract persisted until April 16, 1945, which was the first day on which he became free to work for the plaintiffs. The hearing took place on May 2, 1945. The plaint was issued on March 20, 1945. On March 20, 1945, it was perfectly manifest on the facts that Schuler could not have begun his work because he was still under contract with his former employer. It is also clear that by May 2 the contract to engage him which had been made in the preceding February became capable of practical fulfilment because by April 16 he was free and, therefore, at the date of the hearing he was not merely under the contract, which had been come to long before, but actually engaged in the work which the contract contemplated. The argument was that the relevant date for ascertaining whether he was engaged or not was the date of the plaint, but the court negatived that.

On this subject of engagement there were some observations of MacKinnon L.J. and Morton L.J. (as he then was) which I must read. MacKinnon L.J. says this (1): "The word "'engaged' is deplorably ambiguous. An employer 'engages' "a servant when he makes an agreement with him for his "services. A workman is 'engaged' on work when he is "actually carrying it out. In fact, 'engage' of a master has "an entirely different meaning to 'engaged in' of a workman. "In the phrase we are concerned with the use is of the workman. "I do not find it necessary to express a final opinion on the "point, but I am inclined to think that it was not until "April 16, 1945, that Schuler became a person 'engaged in' "the whole-time employment of the plaintiffs, however "obvious it may be that the plaintiffs had 'engaged' him "long before that date."

In that case it so happened that the date as from which Schuler was able to begin his work coincided with the date when he actually did begin his work. Here we have a reversal of those two things in this sense. The date on which Wilson was engaged to begin his work was September 10. The date when he actually began to work was a later date (as it turned out, October 30), and that postponement was not due to a suspension or cancellation of the contract of engagement, but was simply due to the ill-health of the workman, who was unable to take up his work punctually.

The reasoning of the county court judge would have prevented the landlord getting possession if the man had only been in bed for a week with a cold. In point of fact the illness was longer because it was a rather serious one involving a mastoid operation. That does not affect the contract. The facts are quite different from those in reference to which the observations of MacKinnon L.J. were made in the *Benninga* case (2).

I think myself that Morton L.J. and MacKinnon L.J. mean precisely the same thing, but I find in the actual language used by Morton L.J. a slightly clearer exposition of the point. What he says is this (2), "there is no doubt that Schuler was engaged "in the whole-time employment of the plaintiffs from April 16, "1945, onwards." That, of course, was the date on which he

(1) [1946] K. B. 58, 62.

(2) Ibid. 64.

C. A.

1948

R. F. FUGGLE LD. *v.* GADSDEN.

Lord Greene M.R.

became free from his existing engagement, and on which in fact he did commence his work because, fortunately for him, he was a sound man and not a man suffering from a temporary indisposition. Morton L.J. goes on: "It is unnecessary, "therefore, to decide whether he answered this description at "an earlier date, but I think that he did not, for the reasons "stated by MacKinnon L.J. It seems to me that from "February to April 1945, Schuler had been engaged *for* whole-"time employment in the future by the plaintiffs, but was "engaged *in* the whole-time employment of other persons": and, in order to emphasize the distinction, the word "for" and the word "in" are printed in italics, which no doubt represented the Lord Justice's own underlining in the script of his judgment. But it entirely brings out this point. It was perfectly true that under the February arrangement he was engaged for employment and under a contract for that purpose, but he was not engaged in the employment until he was free from his existing contract.

It seems to me that once this is appreciated the county court judge's interpretation is one which cannot be supported. In my judgment, on the facts of this case, at the relevant date, at the date of the hearing, Wilson was engaged in the whole-time employment of the plaintiffs.

The county court judge having found all other relevant facts in favour of the plaintiffs, that would be an end of the matter, but for one circumstance which I ought to mention. The defendant, who was successful in the county court, has not appeared before us. Mr. Lush, with great propriety, called our attention to a matter which had happened since the judgment, and the matter was this. He told us that Wilson commenced work on October 30—that is, the day after the judgment was delivered. For some reason which we do not know, Wilson terminated his employment on November 5. It does not appear exactly how it was terminated, but one thing, I think, is clear: there was not at the date of the hearing any current notice to determine the contract of engagement; and I rather gathered from Mr. Lush that, as far as his instructions went, Wilson left and threw up the job, to put it shortly. He informed us of that fact because he thought it was right that we should know it, but he argued, and, in my opinion, correctly argued, that it does not entitle us to re-examine the questions of fact which the judge decided, particularly the question of reasonableness.

I must not be taken as expressing any opinion, but if at the date of the hearing in such a case as this the man for whom the house is required is under notice given or received determining the engagement, it may be that the county court judge would be right in holding that he could not be described as being engaged in the whole-time employment of the employer. I say nothing about it one way or the other; I merely call attention to the point.

Another way of looking at the same matter would be the question whether, in those circumstances, it could be reasonable at the date of the hearing to make the order. No circumstance of that kind existed here. The judge came, on the evidence before him, to a finding of fact which it was essential for him to decide, namely, the matter of reasonableness, and on the facts as they stood at the time there is no question but that he had ample jurisdiction on the evidence to come to such a conclusion; and, indeed, I should have been surprised if he had not.

Now what is the position of this court? On the matter as it stood at the hearing, and on the facts as they existed at that date, and as found by the judge, once the judge's error of law, if I may respectfully put it so, is put right, the order would automatically follow. But here is something which has happened subsequent to the hearing which, if it had happened before the hearing took place, might have put a different complexion on the action, and might have led the county court judge to take a different view from that which he did take on the facts. What ought this court to do? Ought it to pay regard to some matter which has happened since the hearing which, if it had happened before the hearing, might have affected the judge's findings of fact?

In my judgment this court cannot take into account such subsequent matters of fact. If it did so, it would be setting itself up as a judge of fact on a matter of fact which the legislature has put into the hands of the county court judge, and as to which, if the county court judge, on adequate legal evidence, has decided, this court has no jurisdiction whatever to interfere with his decision. The only thing that this court could ever do in such a case as that, if it was right to take such a matter into account, would be to send the action back to the county court judge to decide the issues of fact in the light of the new circumstances. That, as it seems to me, would be an intolerable result, because there would never be

C. A.
1948
R. F. FUGGLE LD. *v.* GADSDEN.
Lord Greene M.R.

finality. It seems to me that once you allow this court to examine new facts which have taken place after the judgment on which itself it is not competent to judge, you would completely lose all finality, and nobody would know where he was. It might be suggested that this court, which on appeal would be making the order, ought not to make it unless it were satisfied as to the reasonableness of making it. In my judgment, when the section talks about being satisfied that it is reasonable to make an order, it means the tribunal of fact must be satisfied that it is reasonable to make an order; and once the tribunal of fact on adequate evidence is so satisfied the competence of this court to dabble in that matter is completely ruled out.

That conclusion seems to me to be quite consistent with one aspect of the matter to which I will just refer. It is to be noted that the conditions of engagement relating to the new tenant under the provisions of para. (*g*) do not contemplate or require an engagement of any particular duration. In other words, the person engaged, and for whom the house is obtained might, as events turn out, give notice a day or a week after the order for possession had been made. The employees of the type contemplated, and that would be by far the most common type, would be those engaged on a weekly contract, and that being so the legislature must have realized that it might so happen (and I have no doubt in many cases it does happen) that a landlord would get possession under this section, and then for some reason, perhaps a day, perhaps a week, perhaps a month afterwards, the contract of employment would come to an end and the house would no longer be required for that tenant.

If the condition of engagement had been that it was to last for not less than six months, or something of the kind, then you would have got something much more solid; but once you come to the conclusion, as you must, that this provision applies whether the engagement is a weekly engagement, or an engagement for six months, or an engagement for a year, the right of the landlord to obtain possession is not to be taken away because the very next day the contract of engagement may be brought to an end.

In the present case I think this court is bound by the position as it existed at the date of the hearing.

In the result the appeal must be allowed, and an order made for possession. But there is one matter I think which we ought to consider, and that is, to what extent, and subject to what conditions we will make an order, remembering the provisions of the relevant section of the principal Rent Act, the Act of 1920, s. 5, which says that at the time of making an order "the "court may suspend execution of any such order or judgment, "or postpone the date of possession, for such period or periods "as it thinks fit, and subject to such conditions (if any) in "regard to payment by the tenant of arrears of rent," and so forth.

Here the conclusion I have come to is that the plaintiffs are entitled to their order. In view of what has happened, I think that this court, which is the court making the order, is entitled to consider whether or not any terms should be attached to it, in view of the facts existing at this moment. Whether or not the landlord has a new employee ready to move in I do not know. It may be he has; it may be he has not. But what seems to me to be the proper form of order to make would be an order for possession within one month, with a right to either party to apply to the county court judge for an extension of the time.

What I am saying now is in no sense to deprive the county court judge of his discretion, but merely an illustration of the sort of thing I mean. The weight to be attached to such a thing, if it happened, would be a thing for the county court judge; but it might be that if the month has come to an end and the landlord has not got a new employee to put in, in those circumstances the tenant might say: "Would it not be "reasonable to give me longer time?" On the other hand, the landlord may have engaged a man who was ready to move in at the end of the month, which means the landlord would say that the month ought not to be extended. That is the sort of point—not the only sort of point—which might very well come up for the consideration of the county court judge if either party were to apply under the order which I propose.

Wrottesley L.J. I agree, and I have nothing to add.

Evershed L.J. I agree. As we are differing from the very careful judgment of the county court judge I will add a sentence of my own. The learned county court judge, as my Lord has pointed out, read the observations in the *Benninga* case (1) as compelling him to conclude that the landlords must fail because their servant, Wilson, was, though under contract, not

---

(1) [1946] K. B. 58.

C. A.
1948
R. F. FUGGLE LD. v. GADSDEN.
Evershed L.J.

actually working at the material date, namely, the date of the hearing. For my part I do not think that the observations of MacKinnon L.J. and Morton L.J. lead to any such view of the construction of the material terms of para. (*g*). In any case, in my judgment, this servant, Wilson, was, according to the ordinary acceptation of the English language, in fact at the material time engaged in the whole-time employment of the plaintiffs. He was at that time under an existing obligation by contract to work whole-time for the plaintiffs, though in fact he was not able to work owing to illness. This however does not, in my judgment, negative the view that he was engaged at that time in the whole-time employment of the plaintiff just as much as he would have been if he had happened, on the material date, to be away on a day's holiday or on his annual holiday.

It seems to me that if one asks the question, say, of a postal worker, whether he is engaged in the whole-time employment of the Crown, the answer cannot be in the negative merely because on the day on which one asks the question the postal worker happens to be ill in bed or away on his holiday. I venture to think that the learned county court judge really misread the language which he cited, though it is no doubt true that one sentence particularly in MacKinnon L.J.'s judgment might lead at first sight to the other conclusion.

Upon the other matter I confess that I have myself felt some difficulty in regard to the exact extent of the obligation imposed on this court, on an appeal by a landlord, by s. 3, sub-s. 1, of the Act of 1933. It has, been said many times that proof of the relevant facts under para. (*g*), or under the other paragraphs of sch. I to that Act, is necessary in order to give the court jurisdiction to make an order; but over and above that, the court, in making an order, has to satisfy itself, or to consider, that it is reasonable to make that order. However, I confine myself to saying that, in my judgment, the order proposed by the Master of the Rolls is, in the circumstances of this case, the order that the court ought to make, and I say that particularly having regard to the finding of the learned county court judge in this case as a fact that at the date of the hearing it was reasonable to make an order for possession as asked for by the landlord.

Appeal allowed.

Solicitor: *W. R. Lush.*

J. W. H.

Applied. DIXON *v.* TOMMIS. [1952] 1 All E.R. 725.

BROWN *v.* BRASH AND AMBROSE

C. A.

1948
Apr. 20, 21;
May 4.

Scott, Bucknill and Asquith L.JJ.

Landlord and tenant — Rent restriction — Statutory tenant — Prolonged absence from demised premises—Imprisonment—Onus of proof——Presumption that occupation has ceased—To repel presumption animus possidendi and corpus possessionis to be proved by tenant.

A " non-occupying " tenant prima facie forfeits his status as a statutory tenant under the Rent Restriction Acts, but the term " non-occupying tenant " cannot cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. But absence may be sufficiently prolonged or unintermittent to compel the inference prima facie of a cesser of occupation. The issue is one of fact and of degree. On the assumption of an absence sufficiently prolonged to have this effect, the result in law is as follows. The onus is then on the tenant to repel the presumption that his possession has ceased—by at all events establishing a de facto intention to return after his absence, but neither in principle, nor on the authorities, can this be enough. He must also couple and clothe his inward intention to return, with some formal, outward and visible sign of it, as for instance by installing some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. It may be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation, furniture, though it is not clear that this proposition is involved in the decision of *Brown* v. *Draper* [1944] 1 K. B. 309. On principle, there must be proved by the tenant not only an animus possidendi but a corpus possessionis. If the caretaker moves out, or the furniture is removed, from the demised premises, otherwise than quite temporarily, the protection, artificially prolonged by their presence, ceases and this is so whether the tenant wills or desires such removal or not.

A statutory tenant, who has been convicted of felony and sentenced to imprisonment, cannot rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action. He cannot be in a better position than if his absence and inaction had been voluntary.

APPEAL from Hanley and Stoke-on-Trent county court.

In 1941 one Cooper, the freeholder of a dwelling-house, café and petrol pump station, known as the Roadhouse Café, Blythe Bridge, Staffordshire, let those premises to the plaintiff on a quarterly tenancy at a quarterly rent of 26*l.* On September 20, 1945, Cooper served on the plaintiff a three months' notice to quit, expiring on Christmas Day, 1945. The plaintiff continued in possession after that date, remaining as a statutory tenant under the Rent Restriction Acts. Shortly after the notice had been given the plaintiff had been convicted of stealing six tons of tea and sentenced to two years' imprisonment, leaving in physical possession of the premises, Miss Mould, his mistress for seven years past, and two illegitimate children. On January 11, 1946, Mr. Cooper sold the freehold of the premises to one Metters and two brothers named Plant. On March 9, 1946 Miss Mould left the premises taking with her a substantial part of the furniture and leaving the two children elsewhere with the plaintiff's mother. There was evidence that only three articles of domestic furniture remained in the house. In July, 1946, Mr. Metters and the Plant Brothers brought an action in the county court against the plaintiff, claiming possession of the premises on the ground amongst others that he had abandoned possession of them. On September 12, 1946, judgment was given for the defendant, the present plaintiff, the judge basing his decision on findings that the present plaintiff had not abandoned possession of the premises and that, although he had failed in some of his obligations under the tenancy, it was not reasonable to make an order for possession against him. Between September and late in December, 1946, a man named Mulholland and his wife, relations of the plaintiff, spent two or three hours two or three times a week cleaning the premises. On December 9, 1946, Mr. Metters and the brothers Plant sold the freehold to the present defendants, Messrs. Brash and Ambrose, under a contract which provided that the purchasers might at their own risk take immediate possession on paying a deposit of 500*l*. Mr. Brash, the first defendant, entered into possession of the premises. A few days later on January 25, 1947, the plaintiff was released from prison and sought to repossess himself of the premises but Mr. Brash refused to leave and continued in possession of them. On April 14, 1947, the plaintiff brought this action in the county court claiming possession of the premises and damages for trespass. The defendants, although in possession, counterclaimed (inter alia) for possession. The county court judge upheld the plaintiff's claim for possession, awarded him 100*l*. damages for trespass and rejected the defendants' counterclaim for possession. The defendants appealed.

Vaughan K.C. and *Smallwood* for the defendants (the landlords). The plaintiff, as a statutory tenant, lost the protection of the Rent Restriction Acts when Miss Mould,

C. A.
1948

BROWN
v.
BRASH
AND
AMBROSE.

whom he had left there as a licensee, whilst he was in prison, left the demised premises on March 9, 1946. The legal possession of the premises was then abandoned by the plaintiff and passed to the landlords. A statutory tenant has no estate or interest in the premises but merely a personal right to retain possession of them. See *Keeves* v. *Dean* (1), *Haskins* v. *Lewis* (2) and *Skinner* v. *Geary* (3). A statutory tenant who no longer occupies the demised premises himself, to show that he continues that tenancy, must have (1.) an intention to return to occupancy and also (2.) some outward expression of that intention, either by leaving a licensee there as a token-holder of his possession or, possibly, by leaving furniture on the premises, as being the symbol of his continued possession, *Skinner* v. *Geary* (3) and *Brown* v. *Draper* (4). The mere proof of an animus revertendi is not enough. If Miss Mould agreed to keep possession of the demised premises as the plaintiff's agent, when she left the premises, as his agent, she abandoned them. The onus was on the plaintiff to put in another licensee on the premises when Miss Mould left them and if by committing felony he procured his imprisonment, he cannot claim to be in a better position than if his absence and inaction had been voluntary. The judgment of the county court judge shows that he thought that an animus revertendi without more was sufficient to enable a statutory tenant to preserve his occupancy. Had the plaintiff's furniture been left on the premises as a symbol of possession that might have been enough, but the evidence was that in September, 1946, there were only three articles of furniture on the premises and there was no evidence that these were left by the plaintiff or his agent as a symbol of possession. See *Brown* v. *Draper* (4).

If this contention is wrong and the plaintiff was in possession of the demised premises as a statutory tenant, the county court judge did not consider whether it was reasonable to make the order, by taking into account the factors bearing on relative hardship. See sch. I, para. (*h*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Lloyd-Jones for the plaintiff (the tenant). There was no question here raised on the pleadings under para. (*h*) of sch. I to the Act of 1933. On the first point, I agree that the statutory tenant must have a persisting intention to return to the demised premises. If that condition appears, the statutory tenant continues to enjoy the protection of the Rent Restriction Acts. That was the view of the county court judge and that view, it is submitted is correct. All other matters such as the continued occupancy of a licensee or the leaving of furniture on the premises are merely evidence of the intention of the statutory tenant to return to his home.

---

(1) [1924] 1 K. B. 685.
(2) [1931] 2 K. B. 1.
(3) [1931] 2 K. B. 546.
(4) [1944] K. B. 309.

A statutory tenant can only forfeit his personal right either by a voluntary surrender of his possession which must be strictly proved or by an order of the court: *Brown* v. *Draper* (1). The exodus of Miss Mould was not a giving up by the plaintiff of his possession, since there was no evidence that this was undertaken on the authority of the plaintiff. The onus of proving that the tenant had voluntarily given up possession lay on the defendants, the landlords. The mere absence of the tenant does not cast the proof of an intention to return on the tenant. See *Skinner* v. *Geary* (2) and the earlier cases there cited, and *Newlands* v. *Redford* (3). In the present case it was not disputed that the plaintiff intended to return to his home, on the conclusion of his imprisonment. The plaintiff never abandoned his possession of these premises and the decision of the county court judge was right.

Smallwood replied.

Cur. adv. vult.

May 4. ASQUITH L. J. read the following judgment of the court. The appellants, the defendant landlords, on the appeal rely now on only two of the points set out in a voluminous notice of appeal. (*a*) The first is that from and after March 9, 1946, when Miss Mould left, the plaintiff had, as a legal result of her action, abandoned possession of the premises and was no longer a statutory tenant. His contractual tenancy having terminated at Christmas, 1945, he no longer had any rights at common law after that date; while the statutory tenancy which then succeeded his contractual one had, it was contended, ended in March, 1946. Hence he had no right to possession or to sue for a trespass committed in January, 1947, the material time. This point relates to the claim in the action. (*b*) The second, and only other point, relates to the counterclaim, and only arises if contrary to the defendants' first contention the plaintiff still enjoys the protection of the Rent

(1) [1944] 2 K. B. 309.
(2) [1931] 2 K. B. 546.
(3) (1944) "Estates Gazette," Digest, 227.

Restriction Acts. It is that in considering and rejecting the defendants' counterclaim for possession (a counterclaim anomalous in form since the defendant Brash was and is still actually in physical possession) the county court judge did not take into account the relevant factors bearing on "relative "hardship" (presumably under para. (*h*) of the first schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933) and the reasonableness of making an order.

We will consider these points in turn. (*a*) In support of his first, Mr. Vaughan prayed in aid a number of cases which decide that the protection of the Acts is personal to the occupier and ceases when he ceases to be in occupation. Thus in *Keeves* v. *Dean* (1) it was decided by the Court of Appeal that a statutory tenancy is not assignable, because it is not an estate or interest in the premises, but merely a right enjoyed by some individual in possession not to be dispossessed, a right which would cease if he ceased to be in possession. In *Haskins* v. *Lewis* (2) a tenant moved out of premises partly business and partly residential and sub-let the whole of the residential part to two sub-tenants. The Court of Appeal held he had thereby ceased to be a statutory tenant. In a well known passage in his judgment, Scrutton L.J. said (3): "One thing is quite certain, the original tenant is not residing "in those floors; his sub-tenants are residing there. The "consequence is that you have this position, that the original "tenant is not occupying any part of the original tenancy, the "original dwelling-house, so as to make him a tenant under "the Act; he is not occupying the ground floor and the first "floor as a residence, he is occupying them for business pur"poses; he is not occupying the attic and the basement as "a residence, those portions of the house are being occupied "by the sub-tenants, he is therefore not in personal occupation "of any dwelling-house. That being so, he appears to me to "come within the fundamental principle of the Act that it is "to protect a resident in a dwelling-house, not to protect "a person who is not a resident in a dwelling-house, but is "making money by sub-letting it." But earlier in his judgment he pointed out that the provisions of the Acts, while in the main emphasizing the personal and non-transferable character of the privileges conferred on a statutory tenant as such, are occasionally coloured by the opposite conception;

(1) [1924] 1 K. B. 685.
(2) [1931] 2 K. B. 1.
(3) Ibid. 13.

witness the provision whereby a tenant is treated as including a member of his family residing in the house on the death of the tenant intestate. In *Skinner* v. *Geary* (1) recognition is given to the principle that a statutory tenant by absenting himself from the premises even for prolonged periods does not necessarily cease to be in possession so as to forfeit his status as such. Scrutton L.J. gives as an instance a "tenant who "spends week-ends in a house, or a sea captain who is absent "for months it may be, but in fact returns between his voyages "to the house and has his wife and family living there while "he is away." It is true that the court held that this rule (or exception from the main rule) did not apply to the facts of that case, since the tenant absented himself (unlike the sea captain in the illustration) without any animus revertendi; and, although he permitted certain of his relations to remain in physical occupation, the purpose of this occupation was not to preserve the house for his residence when he returned.

Mr. Vaughan for the defendants relied on this case as by implication deciding that it is only where two separate and distinct conditions are fulfilled that a non-occupying tenant can continue to enjoy the protection of the Acts: (1.) there must be on his part an intention to return and (2.) there must be, meanwhile, a vicarious occupation by some token holder on his behalf, to keep the place warm for him against the time of his intended return; or perhaps a symbolic occupation by chattels left to evidence that intention; and that, so soon as those conditions (1.) and (2.) ceased to obtain and concur, the tenant ceased to be a statutory tenant. On the facts of this case he conceded that there was a continuous de facto intention to return on the part of the plaintiff. But he complained that the judge had wrongly thought this circumstance in itself conclusive. The second condition was equally essential, and, after Miss Mould and the children left the premises in March, 1946, was unsatisfied. Counsel for the defendants also referred to *Brown* v. *Draper* (2) in which case language was used suggesting that leaving furniture on the premises may have the same effect as leaving a licensee on them, and that the removal of the furniture may have the same effect as the removal of the licensee. Counsel claimed that the result of applying these principles to the present case was that the plaintiff's protection extended by the presence of Miss Mould and the furniture on the premises till March 9, 1946, ended with her removal along

(1) [1931] 2 K. B. 546.

(2) [1944] K. B. 309.

with what he contended was the great bulk of the domestic furniture on that date. (There was no finding as to the amount left behind but the uncontradicted evidence of the Mulhollands was, he argued, that only three pieces of domestic furniture were there when they intervened in September, 1946).

The argument on behalf of the plaintiff, the tenant, can be summarized more briefly. Counsel's main propositions were (1.) that clear proof of a persisting intention to return on the part of the absent tenant was the paramount, indeed the only, condition necessary to the continued enjoyment of the protection of the Acts. It was not further necessary to prove that a licensee or caretaker or furniture were left on the premises, and these matters were only relevant as evidence of the intention to return—we may observe at this point that the learned county court judge seems in fact to have acted on the view that a proved intention to return, without more, was decisive. (2.) That *Brown* v. *Draper* (1) decides that a statutory tenant can only lose his status and privileges, as such, in two ways, by a voluntary surrender of possession on his own part, or by an order of the court for posession made against him. Here there was no order of the court made against the plaintiff, and there was no evidence that Miss Mould's removal (with part of the furniture) was his voluntary act or in any way caused or prompted by him. He argued that the onus of proving that it was lay on the defendants, and had not been discharged. He also cited *Newlands* v. *Radford* (2) where the Court of Appeal had decided that a temporary removal by a tenant from a London house during the "blitz," there being on his part an intention to return so soon as the war was over, did not divest him of the protection of the Acts. It should be noticed, however, on the facts of this case that other members of the tenant's family continued to have their meals at the London premises.

The facts of the present case disclose a situation clearly not foreseen or provided for by the Rent Restriction Acts. Anomalous consequences result whether we adopt the principle contended for by the defendants or that contended for by the plaintiff. If the defendants' argument is accepted, the plaintiff must be taken, as at March 9, 1946, simultaneously to intend to return, and to be abandoning possession—an abandonment through the act on that date of someone, Miss Mould, who, so

---

(1) [1944] K. B. 309.

(2) (1944) "Estates Gazette," Digest, 227.

C. A.
1948

BROWN
v.
BRASH
AND
AMBROSE.

far as the evidence goes, was not authorized by the plaintiff to do that act. If the plaintiff's contention is accepted, then it would apply equally if the plaintiff had been sent to gaol (or had gone away) for ten or fifteen years, leaving no licensee or furniture, provided he intended to return at the end of that period, a result contrary to the clear policy of the Acts, which is to keep a roof over the tenant's or someone's head, not over an unoccupied shell, and to economize rather than sterilize housing accommodation.

We are of opinion that a "non-occupying" tenant prima facie forfeits his status as a statutory tenant. But what is meant by "non-occupying"? The term clearly cannot cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend twenty-four hours in all weathers under his own roof for three hundred and sixty-five days in the year. Clearly, for instance, the tenant of a London house who spends his week-ends in the country or his long vacation in Scotland does not necessarily cease to be in occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect: The legal result seems to us to be as follows: (1.) The onus is then on the tenant to repel the presumption that his possession has ceased. (2.) In order to repel it he must at all events establish a de facto intention on his part to return after his absence. (3.) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for five or ten years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts, as affirmed in *Keeves* v. *Dean* (1) and *Skinner* v. *Geary* (2). (4.) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it; that is, instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved, which will not stand empty. It may be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation, furniture; though we are not clear that this was necessary to the decision in *Brown* v. *Draper* (1). Apart from authority, in principle, possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an "animus possidendi" but a "corpus "possessionis," namely, some visible state of affairs in which the animus possidendi finds expression. ~~(5.) If the caretaker~~ (to use that term for short) leaves or the furniture is removed from the premises, otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not. “A man's possession of a wild bird, which he keeps in a cage, ceases if it escapes, notwithstanding that his desire to retain possession of it continues and that its escape is contrary thereto.” We do not think in this connexion that it is open to the plaintiff to rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action. The plaintiff, it is true, had not intended to go to prison; he committed intentionally the felonious act which in the events which have happened, landed him there; and thereby put it out of his power to assert possession by visible acts after March 9, 1946. He cannot, in these circumstances, we feel, be in a better position than if his absence and inaction had been voluntary.

---

(1) [1924] 1 K. B. 685.

(2) [1931] 2 K. B. 546.

Applying these general propositions to the facts of the present case, we hold that the plaintiff ceased to possess the premises or to enjoy the protection of the Acts when Miss Mould and the children left in March, 1946; and that nothing which happened after this date (for instance, his resistance to the Metters and Plant action brought in July, 1946, or the visits of the Mulhollands starting in September of that year) could restore his possession or statutory status. As regards the three items of domestic furniture which on the evidence Miss Mould left behind (apart from questions of de minimis) there is no evidence that either the plaintiff or Miss Mould, or indeed anyone, intended these to remain on the premises as symbols of continued possession by the plaintiff. Nor was it either pleaded

---

(1) [1944] K. B. 309.

C. A.
1948

BROWN
v.
BRASH
AND
AMBROSE.

or argued that the judgment of the county court judge in the previous proceedings (amounting to a decision in September 1946 that the plaintiff had not abandoned possession) was res judicata or created an estoppel in the present case. From March, 1946, on, in our view, the plaintiff lost the protection of the Acts and with it his only rights in respect of the premises. The order for possession and the award of damages for trespass in his favour cannot stand. As regards the counterclaim the defendants, in substance, succeed. It is true that their claim for an order for possession of premises of which they were already in physical occupation is anomalous, but the question in substance is which of these parties is entitled in law to possession, and it follows from our decision on the claim that on this issue the defendants have prevailed. Questions of relative hardship and the reasonableness of making an order for possession for the defendants cannot arise where the tenant by abandoning possession has entirely removed himself from the protective orbit of the Acts. The appeal must be allowed.

Appeal allowed.

Solicitors for the defendants (appellants): *Gregory, Rowcliffe & Co., for F. S. Hawthorn and Son, Uttoxeter.*

Solicitors for the plaintiff (respondent): *Simmonds, Church Rackham & Co., for McKnight and Ryder, Hanley.*

C. G. M.

1948
Apr. 14.

Lord Goddard C.J., Humphreys and Pritchard JJ.

ELKINGTON *v.* KESLEY.

Food and drugs—Sale of adulterated milk—Proceedings against dairyman—Information preferred by defendant against supplier as third party—Charges against defendant and third-party dismissed—Appeal by prosecutor—Case stated by justices—Supplier not made a party—Necessity for joining third-party—Food and Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *ss.* 24, 83.

If, on the hearing of an information before justices, inadmissible evidence is given which, in the opinion of the justices, is prejudicial to the defendant, the proper course for the justices to take is to adjourn the case for hearing by a different bench: the fact that the mind of the court may have been prejudiced by the evidence given is not a ground for dismissing the information.

Where, in proceedings against a defendant under the Food and Drugs Act, 1938, in which the defendant has, in turn, preferred an information against a third party pursuant to s. 83 of the Act, the information against the defendant and consequently that against the third-party has been dismissed, and the prosecution appeal by way of case stated from the dismissal of the information against the defendant, it is essential that the third-party should be made a party to the case, for the reason that if the appeal is allowed and the case remitted to the justices for re-hearing, the defendant, on such re-hearing, will be deprived of the defence available to him under s. 83 against the third party, for the latter cannot be made a party to the re-hearing unless he has been made a party to the appeal.

CASE STATED by justices.

Two informations were preferred by the appellant, W. A. Elkington, an inspector of weights and measures and sampling officer under the Food and Drugs Act, 1938, against the respondent, A. Kesley, a dairyman, charging him that on August 27, 1947, at Marl Pit Hill, Edenbridge, Kent, he did sell to the appellant for human consumption, milk to which had been added water, contrary to s. 24 of the Food and Drugs Act, 1938. An information was then preferred by the respondent under the provisions of s. 83 of the Act (1) against one E. N. Wicks, the supplier of the milk, in which the respondent alleged that the contraventions of s. 24, were due to the act of Wicks and asked that Wicks might be brought before the court to answer the charge.

---

(1) Food and Drugs Act, 1938, s. 83, sub-s. 1: "A person against "whom proceedings are brought "under this Act shall, upon "information duly laid by him "and on giving to the prosecution "not less than three clear days' "notice of his intention, be entitled "to have any person to whose act "or default he alleges that the "contravention of the provisions "in question was due brought "before the court in the pro-"ceedings, and, if, after the "contravention has been proved, "the original defendant proves "that the contravention was due "to the act or default of that "other person, that other person "may be convicted of the offence, "and, if the original defendant "further proves that he has used "all due diligence to secure that "the provisions in question were "complied with, he shall be "acquitted of the offence."

Sub-section 2: "Where a defen-"dant seeks to avail himself of "the provisions of the preceding "sub-section—(*a*) the prosecution, "as well as the person whom the "defendant charges with the "offence, shall have the right to "cross-examine him, if he gives "evidence, and any witness called "by him in support of his pleas, "and to call rebutting evidence; "(*b*) the court may make such "order as it thinks fit for the "payment of costs by any party "to the proceedings to any other "party thereto."

At the hearing before the justices it was proved that all the necessary formalities prescribed by s. 70 of the Act with regard to the taking of samples had been duly complied with by the appellant. The case for the prosecution having been concluded, the respondent gave evidence and in the course of his examination in chief said that he had not always been satisfied with the milk from Wicks. In cross-examination on behalf of the appellant as to why he had not been satisfied with the milk, the respondent said that he had had trouble with Wicks before. He was asked what kind of trouble and his solicitor objected to the question on the ground that the respondent should not be asked indirectly why he was dissatisfied with Wick's milk. The appellant's solicitor replied that he was only asking for information to clear up a point raised by the respondent himself. The court was not specifically asked for a ruling on the question of the admissibility of the questions and the cross-examination continued. On being pressed, the respondent said that the trouble to which he had referred was the same sort as he was in that morning. The respondent was then cross-examined by the solicitor appearing for Wicks, who cast doubts on the respondent's past record as a milk retailer and implied that there had been previous convictions for offences similar to those for which he was then being tried. The respondent was re-examined by his solicitor who said that he wished to clarify the situation and the respondent admitted that he had been convicted of a similar offence on three previous occasions. At the close of the re-examination, and before calling further evidence, the respondent's solicitor submitted that the respondent's case had been prejudiced and that the information against him, and therefore the information against Wicks also should be dismissed. In reply to this submission, the appellant's solicitor submitted that the information which had been received by the court in relation to the respondent's previous convictions had been given by him voluntarily in reply to questions put to him by the solicitor representing Wicks and by his own solicitor, and that as the court had inferentially decided that there had been nothing improper in the questions put to the respondent by the solicitor for the appellant, nothing had occurred to justify the dismissal of the summonses against the respondent or to render Wicks immune from conviction should the evidence establish his responsibility. The justices were of opinion that the submission by the respondent's solicitor that as the respondent's case had been prejudiced, the informations should be dismissed, was correct, and they accordingly dismissed all the informations on the ground that the admission by the respondent of previous convictions had prejudiced the court in the cases then before them.

The appellant applied to the justices to state a case and a case was duly stated as against the respondent only, a copy being sent for information to the third party, who was consequently not a party to the proceedings before the Divisional Court.

Vernon Gattie for the appellant. The justices were wrong in dismissing the informations. There was nothing wrong in any of the questions put to the respondent, and, in particular, the solicitor for the appellant could quite properly have asked questions in relation to the respondent's previous convictions when dealing with the question whether the respondent had exercised all due diligence to secure that the provisions of the Act had been complied with. Nothing which took place at the hearing should have in any way prejudiced the justices in the view that they took of the respondent's case and, even if they were of opinion that their minds had been prejudiced, their proper course was not to dismiss the informations, but to direct that they should be heard by a different bench of justices.

J. Lawrence for the respondent was not called on.

B. H. Waddy, for the third party, as amicus curiæ: The third party to the proceedings before the justices was not made a party to the case stated, and, therefore, the dismissal of the information against him by the justices was final. [He referred to *Rex* v. *Recorder of Derby* (1).]

[LORD GODDARD C.J. It appears to the court that in such a case as the present, if the prosecution is dissatisfied with the decision of the justices, they should have asked for a case to be stated, not only as against the original defendant but also against the third party. If that is not done, in the event of a re-hearing by the justices, the original defendant would be deprived of his remedy against the third party, who, not having been made a party to the appeal, would be able to plead autrefois acquit.]

---

(1) [1944] K. B. 611.

Vernon Gattie in reply: The respondent, through his solicitor, asked that the summons against the third party should be dismissed, and having taken a bad point, he has deprived himself of his remedy against the third party. The prosecutor himself made no charge against Wicks, who was brought into the proceedings by the respondent, and in those circumstances there was no necessity for the prosecution to bring the third party before the court on the appeal.

LORD GODDARD C.J. This case, stated by justices for the County of Kent, before whom an information was preferred against the respondent, Kesley, for selling milk for human consumption to which had been added water contrary to s. 24 of the Food and Drugs Act, 1938, raises some curious points which are somewhat unusual in a case of this description, and also one point of practice which is of very considerable importance.

Dealing first with the facts upon which the case is stated, it appears that the respondent took advantage, as he was entitled to do, of the procedure prescribed by s. 83 of the Food and Drugs Act, 1938, and brought before the court the man who had supplied the milk to him. That section provides: [His Lordship read sub-s. 1 of the section and continued:]

Then it is provided—and I think that both of these next provisions have a bearing on the case—" Where a defendant " seeks to avail himself of the provisions of the preceding " sub-s. (*a*) the prosecution, as well as the person whom the " defendant charges with the offence, shall have the right to " cross-examine him, if he gives evidence, and any witness " called by him in support of his pleas, and to call rebutting " evidence; (*b*) the court may make such order as it thinks " fit for the payment of costs by any party to the proceedings " to any other party thereto."

First of all, it is necessary to observe what are the provisions of the Act: The defendant, if he desires to avail himself of the defence which is given him by s. 83, must first lay an information against the third party. He puts the law in motion against the third party, but then he has to give the prosecution not less than three clear days' notice of his intention. When he has done both of those things the prosecutor knows that not only will there be a case as between himself and the defendant but that the defendant will also be bringing before the court the person who is conveniently referred to as the third party. That person must be brought before the court if the defendant is going to say that the fault is not his but that of some other person because, although the defendant might satisfy the justices that the fault was that of another person and that he himself had used due diligence, it would not give him a defence unless he brought that person before the court.

Once the defendant has brought the third party before the court, the prosecutor may cross-examine the defendant and, I suppose, may give evidence against him; at any rate, they may cross-examine him and he can call rebutting evidence as it is called in the statute, which must mean evidence against the third party, and the defendant can get costs against the third party.

I should say also that the result of the case may be that one or other or both the defendant and the third party may be convicted. The prosecution may prove a contravention of the Act, which prima facie, would affect the defendant, and the defendant may fail to prove that the third party was the person really responsible for the contravention, or the third party may satisfy the court that he was not so responsible and those results may follow partly because of the cross-examination of the prosecutor or for any other reason. On the other hand, the third party may be convicted and the defendant acquitted if the latter shows not only that the contravention was the act of the third party but that he himself had used due diligence to secure that the provisions of the Act were complied with; or, again, both may be convicted because the court may be satisfied that the contravention was due to the act of the third party, but that the defendant had not used due diligence.

That is the scheme of the section. Before I deal with what follows from that, I will deal with the facts of this particular case. The defendant, the present respondent, having brought the third party before the court, all three parties were represented and the defendant was called as a witness. In the course of his examination-in-chief he said: "I have not always "been satisfied with the milk from Wicks"—that was the third party. Then, naturally enough, the solicitor for the prosecutor proceeded to cross-examine him upon that statement, and the first reply that he elicited from the defendant was: "I have had trouble with him before." He was asked what kind of trouble, and finally it came out: "The same sort

1948

ELKINGTON v. KESLEY.

Lord Goddard C.J.

"of trouble as I am in this morning." Speaking for myself, that seems to me to be a fairly innocuous answer because, standing by itself it means no more than this: "On a previous "occasion I have been summoned because of milk which has "been supplied by Wicks, and therefore I have reason to be "discontented."

The cross-examination seems to me to have been perfectly legitimate up to this point, and I do not see that so far there had been anything which could be said to be prejudicial one way or the other. But even assuming that that answer was prejudicial, it has to be remembered that the prosecutor is entitled to cross-examine a defendant who has taken advantage of s. 83, for the purpose of showing that though the contravention might be due to the third party's fault, he, the defendant, had not used due diligence.

However, the matter did not rest there because the defendant was then cross-examined by the solicitor on behalf of Wicks. Once Wicks had been brought before the court by the defendant, it surely would have been a very great hardship if Wicks was not entitled to cross-examine the defendant to credit and everything else, and he must surely be entitled to cross-examine him on the question whether he had not previously been convicted of selling watered milk, because it might form the foundation for the suggestion by Wicks: "You are saying "I watered the milk. I say you watered it when you got it "from me and after I had parted with it and that you have "done it before." One cannot possibly say that such a cross-examination would not be legitimate. The reason why cross-examination about previous convictions, except in the case of special circumstances, is not allowed is because the previous convictions, as a rule, are not relevant, but they may be, and in this case it certainly could not be said that the previous convictions might not be a relevant matter in the proceedings. They certainly might be relevant where the question is whether the original defendant exercised due caution.

Assuming that a man has been convicted on one or two occasions of selling watered milk, and that in each case he obtained it from the supplier who had supplied him on the particular occasions for which he was then before the court, and that he had taken no steps to see that the supplier had been pulled up, and had taken no particular steps to see that he was not being given watered milk, I should think it would be quite open to a court before whom he appeared on a third occasion, to say: "You have had two previous lessons and "you cannot say you exercised due diligence." To crown it all in the present case, the defendant's own solicitor when he started to re-examine, for some reason which seemed good to him—I am not saying it was not right; I do not know what point he desired to make—brought out that his client had been previously convicted on three occasions. As he brought it out in re-examination, the defendant certainly could not complain of that.

Then the justices were asked to dismiss the summonses on the ground that their minds had been prejudiced. I do not think the minds of the justices ought to have been prejudiced in the least by what had taken place. It seems to me that it was perfectly legitimate for them to know all the matters to which I have referred, but assuming that some evidence was given which ought not to have been given and which had prejudiced the minds of the justices, that would be no ground for dismissing the summonses. What they could have done was to say: "We shall adjourn the hearing of these summonses "and arrange for them to be taken before other justices." To say that because some evidence has been given which the justices think has prejudiced their minds, they are entitled to dismiss the summonses is, of course, quite wrong. It is the same as if a prisoner is being tried on indictment at assizes, or at quarter sessions, and per incuriam, or by reason of some inexperience on the part of someone, or something of that kind, or because the prisoner blurts it out, the fact that there have been previous convictions is brought to the attention of the jury. In such a case the proper course, if a point has really been made of the matter, is to discharge the jury from giving a verdict and to have the man re-tried before another jury.

If the justices really thought in this case that their minds had been injuriously affected towards the defendant by reason of the cross-examination, they could, as I have said, have remedied the matter by having the case heard before a different bench on a subsequent occasion, but it was no ground at all for dismissing the summonses. They dismissed the summons against Kesley and having done so, although on a ground which was no ground, they could not possibly allow the summons against Wicks to stand. Whether Kesley asked for the summons against Wicks to be dismissed does not matter.

In the opinion of the court, the justices unfortunately went wrong in this case. They did so for what I may call creditable reasons in one way, because they were so anxious to do justice that they thought it right to dismiss the summons against the defendant, whereas they ought to have directed it to be reheard, but having done what they did, with regard to Kesley I can see no other course that they could have taken except to dismiss the summons against Wicks.

Then the prosecution asked for a case to be stated, and the only person against whom it was stated is Kesley. The question arises: What ought we to do? If there was no question of Wicks in the matter, we should certainly send the case back to the justices with the intimation that there was nothing irregular in what had happened at the hearing and that as they found that there had been a contravention of the Act it was their duty to convict the original defendant. But if we do that in the case of Kesley, it seems to us that we should deprive Kesley of the opportunity of raising his defence under s. 83, because Wicks not being before this court, and the case not having been stated against him, we cannot keep alive the proceedings against Wicks by ordering the case to go back. If Kesley tried to bring Wicks before the court on the rehearing, Wicks would at once plead autrefois acquit, and there would be an end of the matter so far as he was concerned.

The court think it right to say that, in their opinion, where the prosecution ask for a case against a defendant who has taken advantage of s. 83, it is essential that the prosecution should join the third party as a party to the case if the result of the case may be that on a re-hearing the defendant would lose his right against the third party because the third party had not been brought before this court. One reason why I think it is necessary, as I have already pointed out in my analysis of the section, is that when once the third party procedure, to use a convenient expression, has been adopted, the case really becomes a case between three parties. The prosecution are proceeding against the defendant and against the third party and can get a conviction, as I have said, against one or other or both. They are all three parties before the court and the proceeding is one.

It may very well be that in asking for a case against either the defendant or the third party it might not be necessary to join all three parties because, if the appeal were allowed, the effect might not be injurious both to the defendant and the third party, but only to one of them. For instance, supposing the case was dismissed by the justices on the ground that the necessary samples had not been properly taken, the case against the defendant would fail and, as the defendant was not convicted, there could be no question of a conviction against the third party. But supposing a case were stated, on the ground that the justices were wrong in holding that the samples had not been properly taken, it is obvious that if this court took the view that the appeal should be allowed, unless both the defendant and the third party were before the court on the re-hearing, the defendant would have lost his chance of establishing the defence which s. 83 gives him. In such a case as that, both the defendant and the third party should be before the court. If, of course, the result of the case before the justices was that the case against the defendant was dismissed, but that the third party was convicted, and the prosecution wished to appeal on the ground that the justices were wrong in holding that the defendant had used all due diligence, for the reason that there was no evidence on which the justices could so find, then the third party would not be a necessary party to the appeal, since he had been convicted. The only question then would be whether or not the defendant could be convicted as well. That would be a case, therefore, in which there would be no necessity to join the third party.

If the appeal was by the third party, the procedure would depend on the circumstances of the case. He would certainly have to serve the prosecutor, there is no doubt about that, and it may or may not be the case that he would have to serve the defendant; I am inclined to think that as a rule this would be necessary if the appeal is by the third party.

In this case the justices have dismissed the summonses on a wrong ground. If we send the case back, as I have already said, the justices would be debarred from hearing, and the defendant would be debarred from putting forward, the defence provided by the section because one of the necessities of that defence is that he should have the person he brings in before the court, and he cannot have that person before the court because that person has been heard and the summons against him dismissed and we have no right to keep him before the court because the case is not stated against him.

The court has, therefore, come to the conclusion, with some reluctance, that the only thing to do in this case is to say that the justices were wrong in acting as they did, but that we feel that we should be doing an injustice to the respondent if we sent the case back. I should add that I cannot agree with Mr. Gattie's argument that the respondent must suffer because his solicitor suggested that the summons against the third party should be dismissed. What the respondent was concerned with was to get the summons against himself dismissed, and his solicitor pointed out to the justices, perfectly rightly, that if they dismissed the summons against his client they would have to dismiss it against the third party as well. There is no doubt that in the particular circumstances of this case the summonses ought not to have been dismissed against either of the parties on the ground stated by the justices, but we cannot send this case back without depriving the respondent of the defence he is given by statute, and that we are not prepared to do. Therefore, although we express our opinion that the justices were wrong in acting in the way they did, we cannot send the case back, and the appeal will be formally dismissed without costs to anybody.

HUMPHREYS J. I agree with the result proposed by my Lord, and also with the reasons which he has given for that decision. I entirely agree with the observations which he has made as to the mistake which the justices, no doubt with the best intentions, made in dismissing these summonses, and I agree that the ground they have given for dismissing them is no ground at all. I suggested in the course of the argument that the reasonable course for them to have taken, if they really felt their minds were prejudiced by reason of something that had taken place, would have been to say: "We will not "adjudicate in this case." It is, of course, perfectly absurd to say that the reason which they gave is a reason for deciding a particular case in a particular way; it never could be.

I only add something of my own because Mr. Gattie, for the prosecution, suggested that there was something in a judgment which I delivered as one of the three judges who heard the case of *Rex* v. *The Recorder of Derby* (1), which indicated that in my view in such circumstances as arose in the present case it was unnecessary in a notice of appeal to quarter sessions to serve one of the parties. In that case I pointed out, first of all, what the facts of the case were. The medical officer of health, Dr. Lilico, had laid an information against a person called Spalton for selling milk to the prejudice of the purchaser.

(1) [1944] K. B. 611.

Spalton, in turn, laid an information against a person of the same name, Doris Spalton, who traded as the Derbyshire Farmers Dairy, alleging that the fault was hers. She in turn laid an information against the Minister of Food, saying that it was the act or default of the Minister of Food which accounted for the milk not being of the nature and quality demanded, to the prejudice of the purchaser. All those matters were heard together, and I then expressed the view, which I venture to repeat, that in those circumstances what was contemplated by the language of s. 83 was that there was one set of proceedings and one set of proceedings only, in which besides the prosecutor there were two and there might be three or half-a-dozen different persons being both defendant and prosecutor, and that in my opinion in such a case all those persons would be parties to the proceedings.

The original defendant and the Minister of Food were acquitted and Doris Spalton was convicted. She desired to appeal, and the question arose upon whom ought the notice of appeal to be served, since the statute required that it should be served on the other party. Who was the other party or who were the other parties ? I agreed with the other members of the court that the prosecutor was clearly a party to the proceedings who ought to have been served, and then I added that on the facts of that case, I did not think that the original defendant, against whom the information had been dismissed as the result of the findings of the court, had any right to be served with the notice of appeal. That was a case in which the original defendant, if the proceedings against him were dismissed, had no further interest in the matter. I do not think that that decision has any bearing on the facts of this case, in which the justices dismissed the informations against two persons in a case in which I agree with the judgment of my Lord that they ought not to have adjudicated at all, or, if they did, ought to have adjudicated upon the facts of the case, in which case there was clearly no ground on which they could dismiss the summonses.

PRITCHARD J. For the reasons given by my Lord, the Lord Chief Justice, to which I do not desire to add, I agree that this appeal ought to be dismissed without any order as to costs.

Appeal dismissed.

1948

ELKINGTON
v.
KESLEY.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for W. L. Platts, Maidstone.*

Solicitors for the respondent: *Langton & Passmore, for Walker, Temple, Thomson & Passmore, Tunbridge Wells.*

Solicitors for the third party: *Bracher, Son & Miskin, Maidstone.*

P. B. D.

Affirmed.
[1949] 2 K. B. 232

Affirmed. C.A. [1949] 2 All E.R. 68.

1948
May 10.

Denning J.

READING *v.* THE KING.

Petition of right—Claim by ex-sergeant to money taken from him by military authorities in Cairo—Money acquired by ex-sergeant in consideration of his presence in uniform in loaded civilian lorries in Cairo—Relation of Crown to ex-sergeant same as relation of master and servant—Use by servant of facilities given to him by master—Money acquired solely by use of uniform and military position—Crown entitled to money.

In 1944, R., a sergeant in the Royal Army Medical Corps stationed at Cairo received several thousands of pounds from one M. as a reward for sitting in uniform on the front seat of a loaded lorry on several occasions when the lorry proceeded from various respective places outside Cairo to other respective places inside that city. M.'s motive for thus inducing R. to become a passenger in the lorry on its respective journeys was to ensure that the inspection of the lorry by the Cairo police as it entered that city would be evaded. The army authorities took possession of the money which R. had thus obtained.

Held that the case was governed by the principle of law that if a servant acquired money by virtue of his service in such circumstances that the position which he occupied as servant was the real cause of his obtaining the money, as distinct from a mere opportunity for his obtaining it, then he was accountable for it to his master. R. had acquired the money in using the facilities which his master, the Crown, had given to him, such facilities being his army uniform and his position in the army. Those facilities were the sole cause of his being able to get the money. The Crown as being his master was, therefore, entitled to retain the money.

PETITION OF RIGHT.

The supplicant, C. H. Reading, was at all material times a sergeant in the Royal Army Medical Corps stationed at the General Hospital, Cairo, where he was in charge of the medical stores.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

In March, 1944, it became apparent to the military authorities in Cairo that he was living in a luxurious manner and that he had several thousands of pounds sterling standing to his credit at certain banks in Cairo. The special investigation branch of the army made investigations. On March 14 and 24, 1944, in the course of the investigations the suppliant made statements to certain members of that branch. The following is a summary of those statements: On about December, 1942, while he was on leave in Alexandria, a man asked him to help him to sell cases of whisky and brandy to agents in Cairo. In January, 1943, a man called Manole met him outside the General Hospital in Cairo and having referred to the conversation in Alexandria directed him to meet him in a certain village near Heliopolis. The suppliant went to the village and met Manole who was in a lorry. The lorry was loaded with "cases of something." Manole got out of the lorry and directed the suppliant to get into it and to proceed to a particular place in Cairo. The suppliant got into the lorry and carried out his instructions. The suppliant was in full military uniform. The same evening the suppliant met Manole in a restaurant in Cairo and on that occasion Manole handed him an envelope containing 2,000*l.* in notes. The suppliant made further similar journeys in a loaded lorry during the period which extended to March, 1944. The total number of journeys made, including the first journey, was nine. On each journey the suppliant wore full military uniform. After each journey Manole gave him a sum of money which was never less than 1,000*l.* and on one occasion as much as 4,000*l.* The total money thus paid to the suppliant in respect of the nine journeys was 20,500*l.*

On November 11, 1944, the suppliant was tried by court martial and was charged by nine different charges under s. 40 of the Army Act with conduct to the prejudice of good order and military discipline in that he on each of nine different occasions improperly rode as a front seat passenger in a civilian lorry for the purpose of avoiding police inspection and improperly accepted money for so doing. He was found guilty on all the charges and was sentenced to be reduced to the ranks and to undergo two years' imprisonment. Subsequently to the court martial proceedings the military authorities under powers given to them by a military proclamation then in force took possession of the money standing to the credit of the suppliant at his respective banks. They had already taken possession of about 8,000*l.* in cash which Lieutenant Brooks of the special investigation branch had found in the suppliant's flat in Heliopolis. After the military authorities had released certain sums of money for the purposes of the suppliant's legal expenses, there remained in their possession the sum of 13,632*l.* which the suppliant by this petition claimed to be returned to him.

The Crown claimed to be entitled to the money because of the relations of master and servant that existed between it and the suppliant, and because the suppliant had obtained it by using the uniform which belonged to the Crown and his military position as a sergeant in order to assist Manole and his associates in avoiding police inspection.

DENNING J. decided that on the pleadings, the burden of proving that the Crown was entitled to the money which had been taken from the suppliant was on the Crown and therefore the Crown's case was the first of all presented to the Court.

Sir Hartley Shawcross A.-G., P. R. Barry K.C. and *H. L. Parker* for the Crown.

The relationship between the Crown and the suppliant was that of master and servant. It is a well-settled principle of the common law that what a servant earns by his labour whilst he remains with the master or is actually working for him belongs to the master. This principle is clearly set out in Smith's Master and Servant (8th ed.), p. 100. In *Thompson* v. *Havelock* (1) the plaintiff, a captain of a ship, on behalf of the defendant, the owner, let on hire the ship to the Government for six months. An arrangement was made without the knowledge of the owner that the captain should be allowed 1s. per ton of the ship's tonnage per month. The Government paid the amount to the owner and the plaintiff claimed it. Lord Ellenborough said that the captain was a servant engaged on a whole-time basis and he had hired out his services to another. His time belonged to his master, and the servant had no right to the money. No man should be allowed to have an interest against his duty. There would be no security of life or business if servants let themselves out in whole or in part.

The case of *Morison* v. *Thompson* (2) was a case arising out of the purchase of a ship. But for the conduct of a broker

(1) (1808) 1 Camp. 527.

(2) (1874) L. R. 9 Q. B. 480.

who acted for the purchaser the ship could have been bought cheaper. The broker received a present of 225*l*. from the vendor. It was held that the purchaser could recover the 225*l*. from the broker. The principle was laid down in that case that all profits made by the agent are for the benefit of the principal.

In *Burrell* v. *Mossop* (1) the defendant who was the plaintiff's solicitor made a bet with one Bavin who wanted to get a lease of some property from the solicitor's client, the plaintiff, the bet being that if Bavin got the lease he would pay the solicitor 50*l*., and if he did not get the lease the solicitor would pay him 100*l*. The lease was executed and Bavin paid the 50*l*. to the solicitor. It was held that the plaintiff was entitled to call on the solicitor to hand the 50*l*. to him. Lopes L.J. said in that case (2) that the profits made directly or indirectly by the servant belonged to the master.

These cases have never been overruled. They are either cases of bribes paid to the servant or agent or cases of money paid to the servant for work done in his master's time. If a servant uses his master's time or property then he is accountable for the profits he makes by such use. Here the uniform was the property of the Crown and the suppliant used it for the purpose of receiving benefit.

In the American Restatement of the Law, Vol. II. (Agency), 1933, p. 926, the following illustration is given: B. employs A. to take care of his horses. A. lets out the horses on hire to various persons without B.'s knowledge. A. is liable to B. for the sums he has received in respect of the hiring of the horses.

I would also add this illustration:

Supposing a policeman in uniform diverts traffic in order to assist a lorry full of articles stolen from a house by burglars to escape quickly. The Crown would clearly have a right to the money paid to him by the burglars for the help he will have given to them.

In the case of *Attorney-General* v. *Goddard* (3), and in the case between the same parties on demurrer (4) Rowlatt J. held that if a servant received bribes for failing to carry out his master's instructions, the master was entitled to the money he received. That was the case of a police sergeant receiving bribes for failing to report brothel keepers to the authorities. Here the suppliant received bribes in consideration of using his master's uniform in order to help people to smuggle goods into Cairo.

---

(1) (1888) 4 T. L. R. 270.

(2) Ibid. 271.

(3) Unreported, December 12, 1929.

(4) (1929) 98 L. J. (K. B.) 743, 747.

Cyril Salmon K.C., *Colin Pearson* and *H. F. Cassels* for the suppliant. It does not necessarily follow that the master, the Crown, should get the benefit of the money. The first thing to observe is that what was done was not done in the course of the employment of the suppliant. He was employed as a sergeant in charge of stores in the Cairo military hospital. It was not his duty to sit in the front seat of a lorry, nor was there any evidence that the time in which he actually performed the journeys was the time which he ought to have given to the Crown. In the modern army there are periods when one is on duty and quite long periods when one is not on duty, and it was for the Crown to prove that he was, and not for him to prove that he was not, on duty at the respective times of the lorry journeys. They have not proved that.

No doubt if a servant while he is in the course of his employment of a fiduciary nature receives a bribe or derives some profit without the knowledge of his employer, he is accountable to his employer for any money which he has received. He is liable not as a trustee but as a debtor to his creditor the master. It is however fundamental to establish a fiduciary relationship between him and his employer. There was no fiduciary relationship here.

The case of a police sergeant who is on a confidential mission, such as is the *Goddard* case (1), is a case of a fiduciary relationship, but to say that an army sergeant in his spare time is in any fiduciary relationship with the Crown is to say something which is a travesty.

Lister v. *Stubbs* (2), *Dean* v. *MacDowell* (3) and the more recent case of *Regal* (*Hastings*), *Ld.* v. *Gulliver* (4) show respectively that a fiduciary relationship is necessary before a servant or partner or director can be made to hand over any profit he has made. In *Lister* v. *Stubbs* (2) it was specifically stated that the relation of master and servant was that of creditor and debtor and not that of cestui que trust and trustee and therefore the master could not recover commissions corruptly received by the servant.

---

(1) (1929) 98 L. J. (K. B.) 743, 747.

(2) (1890) 45 Ch. D. 1.

(3) (1878) 8 Ch. D. 345, 350.

(4) [1942] 1 All E. R. 378.

The Crown's case is that the suppliant was guilty of a breach of duty which he was required by the King's Regulations to fulfil and in committing that breach he also committed an offence under the Army Act, therefore, the money he got for doing something in breach of that duty belonged to the Crown. The proposition is that if a servant commits a breach of duty then if he receives money during the committing of that breach it is forfeited to his master. There is no authority for that proposition. This strange doctrine would lead to very remarkable results. Supposing it is a term of a servant's employment that he shall not gamble. The servant goes to a race meeting and in breach of this term backs an outsider for 1*l.* at the odds of 100 to 1. Supposing the outsider wins, then according to this doctrine the winnings of 100*l.* belong to the master.

Again it is a breach of s. 40 of the Army Act for officers and members of the A.T.S. to associate together. Officers and A.T.S. owe the Crown a duty not to break the Army Act. Supposing that in breach of this duty an officer does associate with a member of the A.T.S. and he buys her an article of jewellery. According to this doctrine for which the Crown contends, the Crown has a right to claim the article of jewellery.

These and other startling results would follow when once the rule about the necessity of a fiduciary relationship is abandoned.

[DENNING J. What about using the uniform? Is there not a fiduciary duty to use the uniform in a particular way?]

This is not a case where he used the uniform for the purpose of these transactions. He was obliged to wear his uniform wherever he went and was not allowed to wear anything else. If he had been forbidden to wear uniform when he was off duty and had worn uniform on these occasions I concede that the Crown might have had some case against him, but it would only have been for damages for the wear and tear of the uniform.

P. R. Barry K.C. in reply: Counsel for the suppliant has tried to show that the suppliant was not acting in the course of his employment and that there was no fiduciary relationship between him and the Crown, and accordingly the Crown was not entitled to recover the money from him. In my submission, however, in such a case as this it need not be established that the servant was acting in the course of his employment, and it need not be established that there was any fiduciary relationship between him and his master. Furthermore, in this case there was a fiduciary duty to be fulfilled by the suppliant not to use his position in the army nor his master's property, namely the uniform, in carrying out a transaction which amounted to conduct to the prejudice of good order and military discipline. He received this money because he put at the disposal of people dealing in an illicit trade his uniform which tended to give an appearance of respectability to these transactions. It is wholly contrary to the equitable principles recognized in our courts to allow money obtained by such transactions to be retained by a man who has acted like that.

The true principle to be applied to this case is that a servant cannot validly claim to retain profits made by him in abuse of his duty to his master if those profits were earned by virtue of or in connexion with his employment and by the use of his master's assets, namely property or facilities, or if the receipt of those profits puts his interests into conflict with those of his master.

Counsel for the suppliant has ingeniously given some illustrations upon which he relied to support his case. They are all irrelevant to the issue, for none of them go so far as to show that there was a making of a profit directly arising out of the employment and the misuse of the master's assets.

DENNING J. stated the facts and continued: It is quite plain that the suppliant got this money because he was a sergeant in the British Army, and was there in uniform escorting these lorries through Cairo, and he was clearly violating his duty in so doing.

In this petition of right, the suppliant says that those moneys are his, and they should be returned to him by the Crown. In answer, the Crown says: " These were bribes, bribes received " by you by reason of your military employment, and you hold " them for the Crown. Even if we were wrong in the way in ' which we seized them, at all events we are entitled to recover " the amount of them, and to set off the amount." In these circumstances, it is not necessary to dwell on the form of the claim. The question is whether or not the Crown is entitled to the money. It is not entitled to it simply because it is the Crown—money which is unlawfully obtained is not ipso facto forfeited to the Crown. The claim of the Crown rests on the fact that it is the employer, the master of the suppliant and on that account it says it is entitled to the money.

There are many cases in the books where a master has been held entitled to the unauthorized gains of his servant or agent. At law, the action took the form of money had and received. In equity there was said to be a constructive trust due to a fiduciary relationship. Nowadays it is unnecessary to draw a distinction between law and equity. Principles have to be considered in the light of their combined effect. The master's claim in these cases does not rest in contract or in tort, but in the third category known as restitution, the nature of which has been described by Lord Wright in the case of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.* (1). The claim here is for restitution of moneys which in justice, ought to be paid over. I do not mean, of course, justice according to the instinct of the particular judge who happens to try the case, but justice according to the principles of law. In my judgment, it is a principle of law that if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to the master. It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master. Instances readily occur to mind. Take the case given in the American Restatement of the Law, Vol. II, (Agency), 1933, p. 926, of the master who tells his servant to exercise his horses, and whilst the master is away, the servant lets them out, and makes a profit by so doing. There is no loss to the master, the horses have been exercised,

(1) [1943] A. C. 31, 61–64.

but the servant must account for the profits he makes. The Attorney-General for the Crown put in argument the case of a uniformed policeman who at the request of thieves in return for a bribe, directs traffic away from the site of the crime. Is he to be allowed to keep the money? So also here the use of the facilities provided by the Crown in the shape of the uniform, and the use of his position in the Army were the sole reason why the suppliant was able to get this money. It was solely on that account that he was able to sit in the front of these lorries, and give them a safe conduct through Cairo. There was no loss of profit to the Crown. The Crown would have been violating its duty if it had undertaken the task. But the soldier was certainly violating his duty, and it is money which he ought not to be allowed to keep. The law says in those circumstances it must be paid over to the master, in this case, the Crown.

The case of *Attorney-General* v. *Goddard* (1) when Police-Sergeant Goddard was ordered to hand over the bribes which he had received, is parallel to this case, but it does not cover it, because Rowlatt J. in that case and in the case between the same parties on demurrer (2) put his decision on the ground that Sergeant Goddard got the money in the course of making confidential inquiries. The present case goes a step further. This man Reading was not acting in the course of his employment: and there was no fiduciary relationship in respect of these long journeys nor, indeed, in respect of his uniform. In my opinion, however, these are not essential ingredients of the cause of action. The uniform of the Crown, and the position of the man as a servant of the Crown were the sole reasons why he was able to get this money, and that is sufficient to make him liable to hand it over to the Crown. The case is to be distinguished from cases where the service merely gives the opportunity of making money. A servant may, during his master's time, in breach of his contract, do other things, to make money for himself, such as gambling, but he is entitled to keep that money himself. The master has a claim for damages for breach of contract, but he has no claim to the money. So also the fact that a soldier is stationed in a certain place may give him the opportunity, contrary to the King's Regulations, of engaging in trade and making money in that way. In such a case, the mere fact that his service

(1) Unreported, Rowlatt J., December 12, 1929.

(2) 98 L. J. (K. B.) 743, 747.

gave the opportunity for getting the money would not entitle the master to it; but if, as here, the wearing of the King's uniform and his position as a soldier is the sole cause of his getting the money, and getting it dishonestly, that is an advantage which he is not allowed to keep. Although the Crown has suffered no loss, the court orders the money to be handed over to the Crown, because the Crown is the only person to whom it can properly be paid. The man must not be allowed to enrich himself in this way. He got the money by virtue of his employment, and must hand it over. The petition is dismissed accordingly with costs.

Petition dismissed.

Solicitors for the suppliant: *Lewis & Lewis & Gisborne.*
Solicitor for the Crown: *Treasury Solicitor.*

REX *v.* BLACKPOOL RENT TRIBUNAL.
Ex parte ASHTON.

1948
Apr. 21, 29.

Lord Goddard C.J., Humphreys and Pritchard JJ.

Landlord and tenant—Furnished houses rent control—Jurisdiction of rent tribunal—Letting of flat—Articles left by landlord in flat otherwise unfurnished—Whether rent included payment for use of furniture—Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 2, *sub-ss.* 1, 2.

A flat was let to a tenant on a quarterly tenancy under an agreement which was in the common form appropriate to an unfurnished letting. The landlord left within the flat an electric clock with a plug fitted into a wall socket, curtains in two rooms, a gas cooker connected by a short length of pipe with the gas supply pipe, and a water-heater fastened to one of the walls by screws. None of these articles was specifically mentioned in the tenancy agreement, but one of the clauses thereof described stoves as landlord's fixtures or fittings.

Held: None of the articles was furniture within the meaning of s. 2, sub-s. 1 of the Furnished Houses (Rent Control) Act, 1946; wherefore it could not be said that because these articles were in the flat the rent included payment for the use of furniture within the meaning of that sub-section. The rent tribunal for the district in which the flat was situate had accordingly no power under sub-s. 2 to reduce the rent on the ground that these articles were in the flat.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

MOTION for an order of certiorari.

The applicant was a landlord of a flat in Blackpool, which he had let on a quarterly tenancy at a rent of 5*l.* 5*s.* a week. The letting was in the common form appropriate to unfurnished premises, and there was no mention of furniture in it. The landlord had in fact left in the flat the following articles: an electric clock with a plug fitted into a wall socket, curtains in two rooms, a gas cooker connected by a short length of pipe with a gas supply pipe, and a water heater fastened in one of the walls by screws. There was no covenant by the landlord to supply these articles, nor was there any covenant by the tenant to use them. One of the clauses in the agreement described stoves as landlord's fixtures.

On October 13, 1947, the tenant made an application to the Blackpool Rent Tribunal under s. 2 of the Furnished houses (Rent Control) Act, 1946 (1), to fix the rent payable for the premises, and he alleged that the premises were let with the use of furniture, namely, the clock, the curtains and the cooker. He also alleged that the heater constituted a service, but in view of the decision in *Rex* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal. Ex parte Ascot Lodge Ld.* (2), and the fact that the landlord had not contracted to supply a service in this respect in the present case, the suggestion was not carried any further in the Divisional Court.

On November 17, 1947, the chairman and another member of the tribunal visited the premises and on the same date, after hearing the evidence of the tenant, they notified their decision to the landlord that the rent had been reduced from 5*l.* 5*s.* to 3*l.* 3*s.* a week as from that date.

The applicant applied for an order of certiorari to bring the matter up and quash the order of the rent tribunal.

Phillip C. S. Kershaw for the applicant. The landlord denies that he let the flat at a rent which included payment for

---

(1) Furnished Houses (Rent Control) Act, 1946, s. 2, sub-s. 1: "Where a contract has, whether "before or after the passing of "this Act, been entered into "whereby one person . . . . grants "to another person . . . . the "right to occupy as a residence a "house or part of a house situated "in a district in which this Act is in "force in consideration of a rent "which includes payment for the "use of furniture or for services, " . . . . it shall be lawful for either "party to the contract or for the "local authority to refer the "contract to the tribunal for the "district . . . ."

(2) [1947] K. B. 973.

1948

REX
v.
BLACKPOOL
RENT
TRIBUNAL.
Ex parte
ASHTON.

furniture and service, therefore the tribunal had no jurisdiction to entertain the application of the tenant. The first point is: What is the contract? In *Rex* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal. Ex parte Ascot Lodge Ld.* (1) Lord Goddard C.J. said that what the court had to do was to look at the lease. The bargain has to be looked at. That decision was followed in the case of *Rex* v. *Paddington and St. Marylebone Rent Tribunal. Ex parte Bedrock Investments Ld.* (2) and in both cases it was decided that the provision by the landlord of services could not in the absence of a contractual obligation to supply such services operate to bring the letting within the jurisdiction of a rent tribunal set up under the Act. In the case of *Rex* v. *Croydon and District Rent Tribunal. Ex parte Langford Property Company Ld.* (3) it was held that the written agreement governed the position and that the rent tribunal had no power to rectify it. Landlords are not generally willing to render any services, therefore, if they are found to render services, it is only reasonable to expect that the obligation should be put clearly in the contract. The principle laid down in those cases with regard to services should be applied to the question of the use of furniture. If that principle does apply to the case of furniture, then it is obvious that the tribunal in this case had no jurisdiction because there was no reference whatever in the tenancy agreement to the use of furniture.

But assuming that a different principle applies to the question of furniture being let with the premises, there was no furniture let here. The only articles which could be called furniture were the curtains, but the landlord retained the right to remove them at any time, and they were not mentioned in the tenancy agreement. Therefore the curtains did not form part of the letting. As regards the Ascot water heater it was found by the tribunal to be a service, but I understand that in view of the decision in the *Hampstead* and other cases on this point, and in view of the fact that there was no agreement to provide it, the respondents are conceding that it cannot be argued that this heater was a service. As regards the gas cooker, it was described in the agreement as a landlord's fixture or fitting, and it is not ordinarily let as furniture. It is really in the same category as a kitchen range. Only things which are ordinarily regarded as furniture are deemed

(1) [1947] K. B. 973, 980.
(2) [1947] K. B. 984.
(3) [1948] 1 K. B. 60.

1948

REX
v.
BLACKPOOL
RENT
TRIBUNAL.
Ex parte
ASHTON.

to be part of the furniture of a house: *Palser* v. *Grinling*, *Property Holding Co. Ld.* v. *Mischeff* (1). The electric clock is also a landlord's fitting and is not ordinarily regarded as furniture. He also referred to *Gray* v. *Fidler* (2).

H. L. Parker for the respondents. In view of the decisions in the *Hampstead* group of cases, it is conceded that any services supplied by the landlord in this case did not give the tribunal jurisdiction because those services were not supplied under any express contract. The case for the rent tribunal rests entirely on the fact that the rent payable under the tenancy agreement included payment for the use of furniture supplied by the landlord. The principle to be applied to the use of furniture differs from the principle to be applied to the rendering of services and it is not necessary to find any mention of furniture in the contract. The question depends on whether the furniture has been supplied by the landlord and whether as a result it can be implied that the rent includes some payment for the use of that furniture.

If a tenant takes a house which is fully furnished, surely the fact that the contract is silent about the matter of furniture could not possibly be put forward as a reason for holding that the house was not let as a furnished house. The landlord has left this furniture in the flat under such circumstances that the tenant is entitled to expect to be able to use it. In the case of services, the landlord is physically able to stop supplying them at any moment, and then the only question is whether he was bound by contract to supply them. In the *Hampstead* case it was clearly indicated that the question of the use of furniture need not be mentioned in the tenancy agreement for Lord Goddard C.J. says (3): " but if in fact there was furniture " on the premises then, no doubt . . . . the Act would apply."

What has to be considered is the answer to the question asked and answered in *Palser* v. *Grinling*, *Property Holding Co. Ld.* v. *Mischeff* (4), namely, whether " the " articles in question are commonly regarded as furniture." An article may be described as a landlord's fixture or fitting in the lease, nevertheless it may be furniture for the purposes of the Act, if it is commonly regarded as furniture and can be detached from the fabric without appreciable damage, per Lord Simon in the same cases (1). Bearing these principles in mind I submit that the curtains are obviously furniture; so

(1) [1948] A. C. 291, 314.
(2) [1943] K. B. 694.
(3) [1947] K. B. 973, 981.
(4) [1948] A. C. 291, 319.

is the electric clock, for although it was fixed to a wall it could easily be removed without any damage. Also the gas cooker can easily be removed without damage. It makes no difference that this cooker takes the place of a kitchen range, which would not be furniture.

[LORD GODDARD C.J. Do the same principles as those which apply to the Rent Restriction Acts in regard to this matter of furniture apply to this Act of 1946 ?]

As regards the definition of furniture the same principles apply, but there is this difference that whereas in the case of the Rent Restriction Acts, s. 10, sub-s. 1, of the Act of 1923 requires that the amount of rent attributable to the use of furniture must be substantial, nevertheless in this Act there is no such provision, therefore the provision of any article of furniture gives the rent tribunal jurisdiction. It was held in the *Mischeff* case (1) that an electrical refrigerator which got its necessary electric current through a plug in a wall was furniture. It follows that by analogy to that article there should be no doubt that both the gas cooker and the electric clock are furniture. He also referred to *Gray* v. *Fidler* (2).

Cur. adv. vult.

April 29. The judgment of the court was delivered by LORD GODDARD C.J., who, after stating the facts, continued: Two cases under this Act have previously been before this court, *Rex* v. *Hampstead and St. Pancras Furnished Houses Rent Tribunal. Ex parte Ascot Lodge Ld.* (3) and *Rex* v. *Croydon and District Rent Tribunal. Ex parte Langford Property Co., Ld.* (4). Both cases were dealing with services, and the provision of services has the same effect as the provision of furniture in giving a tribunal jurisdiction. In those cases the court laid down that the only question was whether the tenant was contractually entitled to receive the services from the landlord, not whether the landlord in fact supplied the same as a matter of grace or convenience. In our opinion it is quite possible that some different considerations may apply in the case of furniture. For instance, the landlord could not prevent the tribunal acquiring jurisdiction if in fact what was let was a furnished house, or, to use the words of the Act, a house let in consideration of a rent which includes payment for the use of furniture, merely by omitting all reference to furniture in the agreement. At the same time it by no means follows that because a chattel which could be dignified by the name of a piece of furniture belonging to the landlord is left on the premises that would turn what was ordinarily an unfurnished letting into a furnished letting. The question would be whether the letting was in consideration of a rent which includes payment for the use of furniture. How the clock came to be left on the premises is not explained. In our opinion it is impossible to say that because an electric clock, which no doubt would be a great convenience to the tenant, is found in a flat and the clock belongs to the landlord, the rent of the flat must have included payment for its use. The same consideration applies to the curtains. As to them in our opinion the doctrine of de minimis would in any case apply as we think it would to the clock. It is as impossible to suppose that the rent includes payment for their use as it would be if the landlord, for the purpose of making the whole building in which the flats are situate attractive, put window boxes outside the windows in front of the building. The water heater and gas cooker stand in a somewhat different position. The tenant did not claim that the water heater was furniture and he was quite right in not so claiming. We can see no reason why a heater of that description should be in any different position from a boiler which would be part of the ordinary equipment of a flat to which there is not a constant supply of water provided, and indeed in our opinion the same considerations apply to the gas cooker as apply to the water heater. It is necessary in considering whether these articles are to be considered as furniture to refer to the two combined cases of *Palser* v. *Grinling* and *Property Holding Co. Ld.* v. *Mischeff* (1). Those were cases under the Rent Restriction Acts. Those Acts would not apply if there was a furnished letting. The wider the definition given to furniture the worse it makes it for the tenant who seeks the protection of the Rent Restriction Acts and the better for him if he seeks to take advantage of the Furnished Houses (Rent Control) Act, 1946. That anyone would consider that this flat was let as a furnished flat in the ordinary acceptation of that term it is impossible to believe. At the same time if the words of the Act oblige us to hold that it is brought within its terms, we must do so whatever a person not a lawyer would say. Reading the speech of Lord Simon in the cases to which we have been referred we find that in considering whether articles are to be regarded as furniture he says (1): "To sum up, "the first question is whether the articles in question are "commonly regarded as 'furniture'; if so, loose articles "are necessarily included in the expression, while articles "which are not loose will or will not be furniture according "to the nature and degree of attachment." In our opinion the gas cooker is not commonly regarded as furniture. Is there any more reason why it should be regarded as furniture than a kitchen range which could be very likely removed without damaging the fabric of the house as assuredly can many fireplaces? A gas cooker is provided because a person who takes a flat naturally expects to find as part of the flat something upon which he can cook. It is part indeed of the ordinary equipment of the tenement as much as a door, or I should say, a window, or the pedestal in the lavatory, although the latter may be fixed more permanently and firmly than a gas stove. It is not, we feel convinced, what is ordinarily called furniture, and we think that the water heater which the tenant did not consider to be furniture, is a fortiori not furniture. We desire to emphasize that it is no part of a tribunal's duty to endeavour to obtain, by giving a strained construction to ordinary language, a means of exercising their control over unfurnished lettings. Parliament has given tenants of unfurnished houses within certain rents and rateable values a large degree of protection by means of the Rent Restriction Acts. Although no limit of rent or rateable value is fixed in the present Act, it cannot be doubted that Parliament was really concerned with the exorbitant rents which people may be called upon to pay for a few furnished rooms, the furniture of which is often of a very poor description and of little value. If the letting comes within the terms of the Act, it is our duty to give effect to its provisions, but in our opinion it would be quite wrong to say that there was here a letting in consideration of a rent which included the use of furniture and for these reasons in our opinion the rent tribunal assumed a jurisdiction which they did not possess and the order for certiorari must go.

---

(1) [1948] A. C. 291.
(2) [1943] K. B. 694.
(3) [1947] K. B. 973.
(4) [1948] 1 K. B. 60.

---

(1) [1948] A. C. 291, 314.

Order for certiorari.

Solicitors for the applicant: *Boxall & Boxall, for C. M. Phillips, Blackpool.*

Solicitor for the respondents, the Rent Tribunal: *Solicitor, Ministry of Health.*

---

(1) [1948] A.C. 291, 314.

1948
Apr. 20.

Lord Goddard C.J., Humphreys and Pritchard JJ.

TURNER *v.* UNDERWOOD.

Criminal law — Evidence — Appellant charged before justices with indecent behaviour in railway carriage—Voluntary statement by appellant to police: " I have done time for this before "—Statement accepted as evidence by justices—Conviction—Whether statement admissible—Railway Clauses (Consolidation) Act, 1845 (8 *Vict., c.* 20), *s.* 109—*Regulation of Railways Act,* 1889 (52 & 53 *Vict., c.* 57), *s.* 7—*London Midland and Scottish Railway By-Laws, by-law* 14.

The defendant was charged before the justices with indecent behaviour in a railway carriage to the annoyance of a fellow passenger contrary to one of the by-laws of the railway company. On complaint being made to a railway police sergeant, the accused after being duly cautioned made a statement in the course of which he said : " I have done time for this before." The whole statement was read out at the trial as part of the evidence for the prosecution.

It was contended that the evidence of the defendant's having used those words was inadmissible as being tantamount to evidence of a previous conviction.

Held : (1.) Although as a general rule it was the practice in jury cases that where the court knew of something in a defendant's statement which admitted a previous conviction or which otherwise reflected on his character it would not allow that part of the statement to be read out to the jury, nevertheless it was not a rule of law that what a man said in relation to the charge was not evidence against him.

(2.) The evidence to which objection had been taken was relevant inasmuch as it showed that the defendant was admitting that his conduct was a deliberate act of indecency.

(3.) The evidence was rightly admitted.

Case stated by the justices for the county borough of Stockport.

The appellant was charged before the justices that on October 13, 1947 while in a certain railway carriage on the London Midland and Scottish Railway he did behave in an indecent manner to the annoyance of a certain person therein contrary to by-law 14 of the By-laws and Regulations made by the railway company under the Railway Clauses (Consolidation) Act, 1845, as extended by the Regulation of Railways Act, 1889. On the night of October 14, 1947, complaint was made by a passenger against the appellant to a railway police sergeant. The latter cautioned the appellant, who replied :

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

"Can I speak to you alone? I don't want to get into trouble. "I won't do it again. I have done time for this before."

Before the justices an objection was taken on behalf of the appellant that the evidence that he had spoken the words "I have done time for this before" should not be given for (1.) the admission of such evidence, even though the words had been spoken voluntarily was the admission of evidence of a previous conviction of which the court should only take cognizance if and when the case was proved, since the appellant had not put his character in issue, and (2.) the evidence was irrelevant to the charge. The justices, however, overruled that objection and expressed their opinion that the words "I have done time for this before," even taken from their context, were relevant to the charge because, including as they did the word "this," they amounted to an admission of the facts which were alleged against the appellant, and taken in their context they appeared to be an explanation as to why he made a statement. They moreover added to the justice's belief in the truth of the statement as a whole. They, therefore, considered that the evidence of the use by the appellant of those words was admissible, and they stated that they were confirmed in their view by the decision of the Court of Criminal Appeal in *Rex* v. *Chitson* (1). The justices convicted the appellant and fined him twenty shillings.

The ground of the appeal was that the justices had wrongly admitted evidence of a previous conviction of the appellant.

H. J. Baxter for the appellant. The words "I have done "time for this before" clearly amount to an admission of a previous conviction. The appellant had not put his character in issue, and therefore, evidence of a previous conviction should not have been given. It is a general principle of law that during the trial of the issue whether the defendant is guilty of the offence charged, no evidence of his having previously committed any other offence may be given unless he puts his character in issue or unless the case is one of that well defined group where it is necessary to prove design, system, criminal intent or guilty knowledge. The rule is such an important one that in the case of *Rex* v. *Knight and Thompson* (2) a conviction was quashed by the Court of Criminal Appeal solely because the voluntary statements

(1) [1909] 2 K. B. 945.

(2) [1946] 31 Cr. App. R. 52.

1948

TURNER
v.
UNDERWOOD.

made by the two defendants respectively were read to the jury and included admissions by them of having previously committed other offences.

Furthermore, the evidence was irrelevant to the issue whether the appellant had committed the offence charged. This conviction should be quashed for the same reasons as in the *Knight and Thompson* case (1).

The respondent, the informant, was not present and was not represented.

LORD GODDARD C.J. stated the facts and continued: It is said that the conviction ought to be quashed because the words he used, "I have done time for this before," were tantamount to evidence of a previous conviction, as indeed they were.

In the first place, this is a statement made by the man at the time, and in strictness what a man says in relation to the charge is admissible against him. Any voluntary statement which a person makes is admissible in law. It is the practice as a rule in cases which are tried before juries that where the court knows that there is something said by a man in his statement which admits a previous conviction, or shows other matters reflecting on his character, the court sees that that is not read out to the jury; but in this case the officer was giving evidence as to what the man himself said, and no one can say it is a rule of law that what a man says in relation to the charge is not evidence against him. The court must know what has been said before it can rule one way or another whether the evidence is admissible or not. It is not like a case where a judge or chairman or recorder is trying a case on depositions and can say: "I direct you to leave out this part "of the evidence." This statement was also relevant and admissible because, I think, it goes to show that the man was admitting that what he had done was a deliberate and indecent act.

In this case, for myself, I would say that there is no ground for quashing the conviction. The evidence was legally admissible, whatever its weight. I should doubt if the justices gave it any weight if they believed the evidence of the man who was complaining. I am quite satisfied that no injustice was done and that this appeal should be dismissed.

(1) [1946] 31 Cr. App. R. 52.

HUMPHREYS J. I agree. I think the justices were right in admitting the evidence and for the reasons which they give in their carefully stated case.

PRITCHARD J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for John Moorley & Co., Manchester.*

BANKS *v.* COPE BROWN.

1948
May 27.

Lord Goddard C.J., Birkett and Sellers JJ.

Landlord and tenant—Rent restrictions—New control (1939) *house—"Lets any dwelling-house to which this Act applies or any part "thereof"—Rent including payment for use of furniture—Furnished rooms let with the use of a kitchen—Such use shared also by another tenant—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 10—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch. I.*

A landlord let to a tenant a furnished room in a "new control" house together with the use in common with another tenant in the house, of a kitchen, bathroom and w.c.

Held that the landlord had not let a "dwelling-house to which "this Act applies or any part thereof" within the meaning of s. 10 of the Rent and Mortgage Interest (Restrictions) Act, 1920, as amended with regard to new control houses by s. 3 of and sch. I to the Rent and Mortgage Interest Restrictions Act, 1939, since there was no separate letting of part of the dwelling-house.

Neale v. *Del Soto* [1945] K. B. 144 followed.

SPECIAL CASE stated by Middlesex justices.

The appellant, Eileen Greengrass Banks, was charged before a court of summary jurisdiction on an information laid by the Town Clerk of Ealing, for that she between March 6, 1947, and October 15, 1947, in the parish of Ealing, in the county of Middlesex at No. 22, The Park, there situate, let to Albert William Holyman a furnished back room on the ground floor together with the use of kitchen, bathroom and garden, and electricity for stairs and bathroom at an extortionate rent, contrary to s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended) (1).

The rateable value of No. 22, The Park, Ealing was 46*l*. On March 6, 1947, the said furnished back room which was a fully furnished double bed sitting room (apart from the provision of linen and blankets) together with the use of the kitchen, bathroom, w.c. and garden was let by the appellant to Albert William Holyman at a rent of 1*l*. 15*s*. per week, payable weekly in advance, this rent including the electricity used on the staircase and in the bathroom. The use of the kitchen, bathroom and w.c. was shared by Holyman and his wife with another tenant, one Palmer, who occupied the front room on the ground floor of the premises. Holyman continued in occupation, but on October 22, 1947, the rent tribunal acting under s. 2 of the Furnished Houses (Rent Control) Act, 1946, reduced the rent for the letting to 15*s*. 6*d*. per week which was the rent paid by Holyman at the date of the summons, January 7, 1948. The justices held that the letting was one to which s. 10 of the Act of 1920 applied; that the offence had been committed and fined the appellant 15*l*. with 10 guineas costs.

Vick K.C. and *I. H. Jacob* for the appellant. The appellant here did not let " any dwelling-house to which this Act applies " or any part thereof " within the meaning of s. 10 of the Act of 1920, as amended by the Act of 1923 and with regard to new control houses, as in this case, by sch. I to the Act of 1939. By s. 16 of the Act of 1933: " ' Dwelling-house ' has the same " meaning as in the principal Acts, that is to say a house let " as a separate dwelling or a part of a house being a part so " let." The appellant let a part of a house, but she did not let it as a separate dwelling. Where a landlord let a part of a house with the use of a kitchen, in common with herself, it was held that the part of the house was not let as a separate dwelling : *Neale* v. *Del Soto* (1). The ratio decidendi was the sharing of the kitchen and it can make no difference whether the use in common is shared with the landlord or with another tenant, as in this case. In *Cole* v. *Harris* (2) the principle laid down in *Neale* v. *Del Soto* (1) was followed, though the case was distinguished on its facts, since in that case a bathroom with a w.c. was shared by the landlord and two tenants and this was not a living or dwelling-room. The court there expressed the opinion that they would have held otherwise had the use of the kitchen been so shared, since the kitchen was a living room. The test is the sharing or use in common of a living room between the tenant and any other person under the agreement for letting. As Morton L.J. said in *Cole* v. *Harris* (3) : " I think that the true test, where the tenant " has the exclusive use of some rooms and shares certain " accommodation with others, is as follows : there is a letting " of part of a house as a separate dwelling, within the meaning " of the relevant Acts if, and only if, the accommodation which " is shared with others does not comprise any of the rooms " which may fairly be described as ' living rooms ' or ' dwelling- " ' rooms.' To my mind a kitchen is fairly described as a " ' living-room,' and thus nobody who shares a kitchen can be " said to be tenant of a part of a house let as a separate " dwelling." [*Sharpe* v. *Nicholls* (4) and *Krauss* v. *Boyne* (5) were also cited.]

---

(1) By s. 10 of the Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 10, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, and with regard to new control houses by s. 3 and sch. I of the Rent and Mortgage Interest Restrictions Act, 1939: " Where " any person after the commencement of the Rent and Mortgage " Interest Restrictions Act, 1939, " lets any dwelling-house to which " this Act applies or any part " thereof at a rent which includes " payment in respect of the use of " furniture, and the rent charged " yields to the landlord a profit " which, having regard to all the " circumstances of the case, is " extortionate, then, without " prejudice to any other remedy " under this Act, the landlord " shall be liable on summary conviction to a fine not exceeding " 100*l*. . . . ."

Secondly, the rent at which the furnished premises were let was not one which yielded to the landlord a profit which, having regard to all the circumstances of the case was " extortionate." That word necessarily involves unfairness or oppression or similar conduct of a blameworthy character on the part of the landlord. The amount of profit, if there be no element of unfairness in the conduct of the landlord cannot render the profit " extortionate " : *Binnie* v. *Morris* (6).

W. G. Wingate for the respondent. The house was a new control house. I agree that there would not be a separate letting of a kitchen, whether it were shared by the landlord or another tenant. But by sch. I to the Rent and Mortgage

---

(1) [1945] K. B. 144.
(2) [1945] K. B. 474.
(3) Ibid. 485.
(4) [1945] K. B. 382.
(5) [1946] 1 All E. R. 543.
(6) 1943 S. C. (J.) 119.

Interest Restrictions Act, 1939, s. 12, sub-s. 2, of the Act of 1920, by which, "This Act shall apply to a house or a "part of a house let as a separate dwelling" was not to apply to new control houses. Its place was taken with regard to these dwelling-houses by s. 3 of the Act of 1939. By that section the principal Acts are to apply, subject to modifications, to dwelling-houses of a certain rateable value. There is no word in s. 3 about the dwelling-houses being separately let. The Act of 1939 introduced a new criterion of control, namely, that of rateable value so that it introduced control of houses as distinct from control of landlords, the control of freeholds as distinct from the control of lettings: see the judgment of Scott L.J. in *Field* v. *Gover* (1). Section 10 therefore, which applies where any person lets any dwelling-house to which this Act applies, includes all furnished lettings of houses of the rateable value mentioned in s. 3 of the Act of 1939, whether or not they are separately let. As to the second point, an excessive profit is one that is extortionate.

LORD GODDARD C.J. The facts of this case show that the defendant landlord let out a furnished room in this house to a tenant named Holyman and another room in the house to a tenant named Palmer and to each of those tenants she gave the right to use, in common with the other tenant, the kitchen, bathroom and w.c. The question raised by the case is whether or not, under those circumstances, the Rent Restriction Acts apply to the letting by the appellant; because if they do not, it seems to me to follow that the provisions of s. 10 of the Act of 1920, as amended by the Acts of 1923 and 1939 (with regard to new control houses), which imposes a penalty on a person who "lets any dwelling-house to which this Act applies or any part "thereof at a rent which includes payment in respect of the "use of furniture, and the rent charged yields to the landlord "a profit which, having regard to all the circumstances of the "case is extortionate" do not apply to this letting. That section seems to me to provide, in the clearest possible terms, that the penalty shall be recoverable only if the person charged lets a house or part of a house to which the Acts apply. If the Acts do not apply to the letting, it follows that s. 10 does not apply.

The history of the legislation is, I think, fairly well-known.

---

(1) [1944] K. B. 200, 205.

The Rent Restriction Acts, when they were first introduced in the days of the 1914–1918 war, had no application to furnished lettings. Accordingly, landlords were minded to avoid the provisions of the Act by putting into the house some inconsiderable piece of furniture, which might only be a strip of linoleum, or something of that sort, saying that the rent then included not only the occupation of the house, but also the use of the furniture, and that therefore the Rent Restriction Acts did not apply to it. That state of affairs, in the opinion of the legislature, called for a remedy. Accordingly, s. 9 of the Increase of Rent and Mortgage Interest Restrictions Act, 1920, provided that: "Where any person lets, "or has, before the passing of this Act, let any dwelling-"house to which this Act applies, or any part thereof, at "a rent which includes payment in respect of the use of "furniture, and it is proved to the satisfaction of the "county court on the application of the tenant that the rent "charged is yielding or will yield to the landlord a profit more "than 25 per cent. in excess of the normal profit as hereinafter "defined, the court may order that the rent, so far as it exceeds "such sum as would yield such normal profit and 25 per cent. "shall be irrecoverable, and that the amount of any payment "of rent in excess of such sum which may have been made in "respect of any period after the passing of this Act, shall be "repaid to the tenant." That section was to some extent varied by the Act of 1939 with regard to new control houses, and it reads: "(1.) Where any person lets, or has, since the "beginning of the date of the passing of the Rent and Mortgage "Interest Restrictions Act, 1939, let any dwelling-house to "which this Act applies, or any part thereof, at a rent which "includes payment in respect of the use of furniture, and it is "proved to the satisfaction of the county court on the appli-"cation of the tenant that the rent charged is yielding or will "yield to the landlord a profit in excess of the normal profit as "hereinafter defined, the court may order that the rent, so far "as it exceeds such sum as would yield such normal profit shall "be irrecoverable, and that the amount of any payment of rent "in excess of such sum which may have been made in respect of "any period after the commencement of the Rent and Mortgage "Interest Restrictions Act, 1939, shall be repaid to the tenant. "(2.) For the purposes of this section 'normal profit' means the "profit which might reasonably have been expected from a "similar letting in the year ending on the 1st September, 1939."

Then that was followed by s. 10, the material part of which I have read and the Act of 1939 with regard to new control houses, omitted the words in s. 10 of the Act of 1920 following " having " regard to all the circumstances of the case " namely, " and in " particular to the margin of profit allowed under the last " preceding section of this Act."

It is clear that before a charge under s. 10 can be proved it must be shown that the letting is one to which the Acts apply. The Acts apply to a letting of a house as a whole, or a house let in parts. But it has got to be a letting of the part of a house as a separate dwelling, and that is made clear, by s. 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides that " ' Dwelling-house ' has the same " meaning as in the principal Acts, that is to say, a house " let as a separate dwelling or a part of a house being a part " so let." By sch. I to the Act of 1939, s. 12, sub-s. 2, of the Act of 1920, does not apply to new control houses, but there is no such provision with regard to this definition of dwelling-houses in s. 16 of the Act of 1933, and by s. 3 of the Act of 1939, the principal Acts apart from amendments in that Act apply to new control houses. So far as I am aware, ever since these Acts have been in force, the initial question for the court has always been whether the house in question or a part of the house is let as a separate dwelling; if it is not, the Acts do not apply to it. Unless the Acts apply to the letting then a penal section, such as s. 10, has no application to that letting.

The contention of the landlord in this case is that the part of the house let to the tenant was not let as a separate dwelling, and for that, reliance is placed upon the case of *Neale* v. *Del Soto* (1), a decision binding on this court. That case decided that, where there was a letting of certain rooms in a house, together with the right to use the kitchen in common with the landlord, there was no letting as a separate dwelling-house. Then by *Cole* v. *Harris* (2), *Neale* v. *Del Soto* (1) was followed as regards the principle which was there laid down, although *Cole* v. *Harris* (2) was distinguished on the facts. In that case, the use in common being of a bathroom containing a w.c. by a landlord and two tenants, all the members of the court applied the principle of *Neale* v. *Del Soto* (1), but one member of the court, Lawrence L.J., as he then was, thought the principle of *Neale* v. *Del Soto* (1) would apply where the room shared was a

(1) [1945] K. B. 144. (2) [1945] K. B. 474.

1948

BANKS
v.
COPE
BROWN.

Lord Goddard C.J.

bathroom and w.c.; the other two members of the court MacKinnon and Morton L.JJ., thought that that was not enough, in that a bathroom with a w.c. could not be said to be a living room or a dwelling-room, but that if a kitchen had been shared, that would have been a living room so that the principle laid down in *Neale* v. *del Soto* (1) would have applied in that there would not have been a separate letting of a part of the house.

In this case, the right to use the kitchen was conferred on both the tenants in the house, and it seems to me, and indeed Mr. Granville Wingate, in the course of his very careful argument, has conceded, that he cannot draw any distinction in principle between the case where part of a house is let to a tenant who has the right to use the kitchen in common with the landlord, and that where one tenant is entitled to share the use of the kitchen in common with another tenant. He was right in making that admission, because in *Cole* v. *Harris* (2), Morton L.J., in delivering the leading judgment of the court, said (3): "I think that the true test, where the tenant has "the exclusive use of some rooms and shares certain accom-"modation with others, is as follows: there is a letting of "part of a house as a separate dwelling, within the meaning of "the relevant Acts if, and only if, the accommodation which is "shared with others does not comprise any of the rooms which "may fairly be described as 'living rooms' or 'dwelling rooms.' "To my mind a kitchen is fairly described as a 'living room,' "and thus nobody who shares a kitchen can be said to be tenant "of a part of a house let as a separate dwelling."

In my opinion the principle laid down in *Neale* v. *Del Soto* (1) and followed in *Cole* v. *Harris* (2) obviously applies here, although the common use is one common to two tenants, and not common to a tenant and a landlord. For these reasons, I think that this letting was never within the Rent Restriction Acts and that the appellant had not within the terms of s. 10 of the Act of 1920, as amended with regard to a new control house, "let any dwelling-house to which this Act applies or "any part thereof." The appeal must be allowed.

Mr. Vick for the tenant raised another question as to the meaning to be attached to the words in s. 10: "a profit which, "having regard to all the circumstances of the case, is "extortionate," and called our attention to the case of *Binnie*

---

(1) [1945] K. B. 144.

(2) [1945] K. B. 474.

(3) Ibid. 485.

1948

BANKS
v.
COPE
BROWN.

Lord Goddard
C.J.

v. *Morris* (1) in Scotland, in which the learned Lords of Justiciary had given their opinion as to the construction to be applied to the word " extortionate " in the section. This court does not find it necessary to deal with the point. I can only say, speaking for myself, I should require very full and careful argument before I came to any decision upon it, at any rate on the lines that Mr. Vick has suggested. I should add that if a landlord were minded to make an extortionate profit by letting out various furnished rooms in a house, and evaded the Rent Restriction Acts by letting some rooms in common, the tenant in such a case would not be without remedy. A remedy has been given now under the Furnished Houses (Rent Control) Act, 1946, a remedy which in fact had been invoked in this case. All we have decided in this case is that no offence under s. 10 has been committed, because the Acts do not apply to this letting.

BIRKETT J. I am of the same opinion, for the same reasons, and I have nothing to add.

SELLERS J. I agree.

Appeal allowed.
Conviction quashed.

Solicitors for the appellant: *Osmond, Bard & Westbrook.*

Solicitor for the respondent: *E. J. Cope Brown, Town Clerk, Ealing.*

(1) 1943 S. C. (J.) 119.

C. G. M.

Discussed. HOPES *v.* HOPES. [1948] 2 All E.R. 920.

THOMAS *v.* THOMAS.

1948
May 28.

Lord Goddard
C.J.,
Birkett and
Sellers JJ.

onsidered. HEWITT
. HEWITT
[1952] 2 Q.B. 627

Husband and wife—Maintenance order—Made whilst husband and wife are living separately—Wife returns to husband's house as tenant of part of it—No resumption of cohabitation—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *ss.* 4 *and* 5—*Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 2, *sub-s.* 2.

Where a wife, when living apart from her husband, obtains an order under the Summary Jurisdiction (Married Women) Act, 1895, and subsequently returns to the husband's house by his permission, as if she were a tenant, but there is no resumption of cohabitation, the order remains effective and enforceable, since sub-s. 4 of s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, has no application to the case where such an order is made when the spouses are living separate and apart. By sub-s. 2 of s. 2 of the Act of 1925, the order remains effective and enforceable unless the spouses resume, not residence under the same roof, but cohabitation.

Evans v. *Evans* [1948] 1 K. B. 175 distinguished on the facts.

CASE STATED by Glamorgan justices.

Mrs. A. Thomas, on February 20, 1946, obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, as amended, against her husband, Mr. L. Thomas, a collier now earning between 7*l.* and 8*l.* a week, on the ground of desertion and the husband was ordered to pay his wife 2*l.* per week and 10*s.* per week for the infant child of the marriage. At the date of the order the husband and wife were living separate and apart from each other. Not more than fourteen days after the making of the order the wife returned to reside in the husband's house together with her child, by his permission. She occupied a parlour room on the ground floor and a bedroom on the first floor and the husband occupied the rest of the house including the kitchen, but there was a joint use of lavatory accommodation and the staircase. The husband with the intention and object of affording separate accommodation for himself and for his wife that they might live separate lives had provided a new water tap for the sole use of the wife, retaining for himself the sole use of the water tap already installed. The wife did her cooking in the kitchen of the next door house. On April 10, 1946, the husband and wife agreed that the wife should pay her husband 10*s.* a week rent for her accommodation and with the sanction of the justices the husband was allowed to deduct the 10*s.* from the 2*l.* 10*s.* payable under the order, through the court collecting officer, to the wife.

The husband in his evidence said: "We live separate lives "—apart and distinct. My wife does nothing for me. She "performs no domestic duties." The wife confirmed this and the justices found that the husband and wife, although living under the same roof, lived separate lives. They also found that the husband was the sole tenant of the house and the rooms occupied by the wife contained some articles of furniture belonging to the husband and others provided by the wife; that the husband had on several occasions requested his wife to leave the house and had also served on her several notices to quit; and that there had been no acts of intercourse between the husband and the wife, as had been stated by the husband.

1948

THOMAS
v.
THOMAS.

There was owing under the order of February 20, 1946, arrears of 11*l*. 3*s*., when the wife on March 3, 1948, preferred a complaint before a court of summary jurisdiction sitting at Gowerton that the arrears were unpaid. The husband contended that the separation order was neither effective nor enforceable and that no proceedings could be brought by the wife against him whilst she continued to reside in his house and *Evans* v. *Evans* (1) was cited. The justices held that s. 1, sub-s. 4, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (2) applied only in the case where the husband and wife were residing together and had not separated at the time when the maintenance order was made, as in the case of *Evans* v. *Evans* (1) and that the appropriate section was s. 2, sub-s. 2, of that Act. There had been no resumption of cohabitation and so the order was effective and enforceable. The justices committed the husband to prison for one month, the order to be suspended so long as he paid the amount payable under the current order (less 10*s*. per week rent, whilst the wife continued to live in the same house) and 5*s*. a week off the arrears of 11*l*. 3*s*.

Wallis-Jones for the appellant husband. The case is covered by *Evans* v. *Evans* (1). Although there has been no resumption of cohabitation the order was unenforceable and no liability accrued under it while the wife resided with the appellant and it ceased to have effect after she had resided for three months with him; s. 1, sub-s. 4, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. The words "no order made "under the principal Act" in s. 1, sub-s. 4, are comprehensive and cannot be limited to orders made while the parties are cohabiting, or to orders so made on the grounds of the husband's cruelty. Section 1, sub-s. 4, deals with "residing with" whereas s. 2, sub-s. 2, deals with cohabitation, which are different states with different legal consequences. Resumption of cohabitation under s. 2, sub-s. 2, determines the order ipso facto, *Abercrombie* v. *Abercrombie* (1), whereas co-residence must continue for three months before the order ceases to have effect. Both sections are applicable to orders made while the parties are apart. The wife is residing with the appellant: she has no tenancy of part of the house. In effect, the appellant had the order against him reduced so long as he provided a home for the wife. The wife is entitled to reside with the appellant or to enforce the order, but cannot do both.

---

(1) [1948] 1 K. B. 175.

(2) Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, sub-s. 1: "An application by a married woman for "an order or orders under the "Summary Jurisdiction (Married "Women) Act, 1895, as amended "by any subsequent enactment "(which Act as so amended is "hereinafter referred to as the "principal Act) on the ground "of cruelty or neglect by her "husband, may be made notwithstanding that the cruelty "or neglect complained of has "not caused her to leave and live "separately and apart from him, "and accordingly the words 'and "'shall by such cruelty or neglect "'have caused her to leave and "'live separately and apart from "'him' in section four of that "Act are hereby repealed."

Sub-s. 4: "No order made under "the principal Act shall be enforceable and no liability shall "accrue under any such order "whilst the married woman with "respect to whom the order was "made resides with her husband, "and any such order shall cease "to have effect if, for a period of "three months after it is made, "the married woman continues to "reside with her husband."

Section 2, sub-s. 2: "Where a "married woman with respect to "whom an order has been made "under the principal Act resumes "cohabitation with her husband "after living apart from him . . . . "the order shall cease to have "effect on the resumption of such "cohabitation . . . ."

The wife did not appear.

LORD GODDARD C.J. Cohabitation does not necessarily depend upon whether there is sexual intercourse between husband and wife. "Cohabitation" means living together as husband and wife; and, as I endeavoured to point out in *Evans* v. *Evans* (2), cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Of course, sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse it is very strong evidence—in fact it may be conclusive evidence—that they are cohabiting; but it does not follow that because they do not have sexual intercourse they are not cohabiting. "Cohabiting," as I have said, means the husband and wife living together as husband and wife.

In this case, when the wife resumed residence in her husband's house she resumed it by an arrangement with her husband under which she and her child occupied entirely separate rooms in the house and the husband occupied other rooms and,

(1) [1943] 2 All E. R. 465.

(2) [1948] 1 K. B. 175.

apparently, made some alteration to the plumbing of the house, or to the water supply of the house, so that the two parties should be able to live entirely separate and get the necessary water, each without interfering with the other. Not only that, but at some time when there were proceedings before the court, the wife endeavouring to enforce this order, the parties came to an agreement, which they communicated to the justices, under which, as the wife was living again within the four walls of her husband's house, it was arranged between them that she should pay 10s. 0*d.* a week or (what was the same thing) allow off the maintenance 10s. 0*d.* a week as representing the rent which she was willing to pay to her husband. It was found, in the case that the husband had served on his wife several notices to quit. It looks as if, whatever the parties might have done technically in law, they intended that the wife should be a tenant of a part of this house.

When the proceedings were taken to enforce the order of February 20, 1946, to recover under it the arrears of 11*l.* 3*s.*, the husband sought to evade liability by saying that the same state of affairs existed in this case as had existed in the case of *Evans* v. *Evans* (1). The justices, who evidently gave great attention to this case, have decided (in my opinion rightly) that the decision in *Evans* v. *Evans* (1) does not apply. They have stated why they think it does not apply (and why, indeed, it does not apply) because here the very state of affairs existed which we visualized might exist when this court gave its judgment in *Evans* v. *Evans* (1). We pointed out that different considerations would arise, or might arise, if the case fell within s. 2, sub-s. 2, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. Until the passing of this Act a woman could not apply before justices for an order of separation under the Summary Jurisdiction (Married Women) Act, 1895, unless she had quitted her husband's house and lived away from him. Then that was thought, as I pointed out in *Evans'* case (1), to be a hardship on a wife, because it called upon her, before she could get an order against her husband and get money from him, to take herself off and live elsewhere, and she might have no money with which to do this. The legislature therefore, in 1925, altered the law and provided that a wife could apply for and obtain an order from the justices although she was still residing with her husband. That provision, if it stood alone might easily have resulted in an intolerable state of

(1) [1948] 1 K. B. 175.

1948

THOMAS
v.
THOMAS.

Lord Goddard
C.J.

affairs, if a woman living with her husband had obtained an order for maintenance against her husband and yet continued to live in the house and said to him: "I am continuing to live "in your house but I am not going to offer any services to you. "I am not going to do that which a wife should do for her "husband, but you must pay me weekly the amount ordered "by the justices." Such a state of affairs might well have led to assault and the forcible ejection of the wife from the house. So provision was made by the same Act that if a wife obtained an order whilst she was living with her husband, that order was not to be enforceable so long as the wife continued to reside with her husband, and if she "continues to reside"—those are the words—with her husband for a period of three months after the order was made, it was to cease to have effect. Sub-section 1 of s. 1, of the Act of 1925, allowed a married woman to apply for a maintenance order, while she was living with her husband, and then by sub-s. 4: "No order made under the "principal Act shall be enforceable and no liability shall accrue "under any such order whilst the married woman with respect "to whom the order was made resides with her husband, and "any such order shall cease to have effect if, for a period of three "months after it is made, the married woman continues to "reside with her husband." That obviously refers to residence at the time when the order is made and continuous residence for three months thereafter.

We find a different provision in s. 2, sub-s. 2: "Where a "married woman with respect to whom an order has been "made under the principal Act resumes cohabitation with her "husband after living apart from him . . . . the order shall "cease to have effect on the resumption of such cohabitation ". . . ." That sub-section applies to the present case. An order was made under the principal Act when the parties were neither cohabiting nor residing with each other; they were living apart. This case falls exactly within the words of sub-s. 2 since the wife was living apart from her husband at the time when the order was made. That order remains effective unless the wife "resumes co-habitation"—not "residence"—but "cohabitation." We need not consider whether Parliament could have visualized in 1925 the state of affairs in housing matters which exists at this time, when it may be extraordinarily difficult for two spouses, if they separate, each to find separate accommodation. We merely have to construe the words of the Act; and the words of the

Act seem to me to show clearly that once the parties are living apart when the order is made, what will put an end to that order is not residence but cohabitation. Contrast the words "resides with" used in sub-s. 4 of s. 1, with those used in sub-s. 2 of s. 2, "resumes cohabitation."

When the judgments in *Evans* v. *Evans* (1) are read carefully it will be seen that the court visualized the very case which has arisen here, and we pointed out the difference between the residence which was sufficient to prevent the order taking effect under s. 1 and the resumption of cohabitation which was required to put an end to an order which had taken effect when the parties were living apart. The justices were right in holding that the order having been made while the parties were living apart and there having been no resumption of cohabitation, the wife being treated as a mere tenant of part of her husband's house, the order of February 20, 1946, remained effective and enforceable. This appeal, therefore, fails.

BIRKETT J. I am of the same opinion, and I have little to add after the judgment which has just been delivered. The justices in this case most admirably fulfilled their duty: first of all, they ascertained what was the law, and it is clear to me, from the opinion which they attached to this case, that they had considered with great care the decision of this court in *Evans* v. *Evans* (1) and in particular the observations of my Lord in that case, pointing out the essential distinction between the provision of the Act in s. 1, sub-s. 4, and that in s. 2, sub-s. 2. Section 1, sub-s. 1, of the Act, provided that an application might be made by a wife on the grounds of cruelty or neglect by her husband for an order under the principal Act, although she was living with her husband. That was an alteration in the law. But then by sub-s. 4 it was provided that the order was not to be enforceable whilst the wife resided with her husband and the order was to cease to have effect if for a period of three months after it was made the wife continued to reside with her husband. But the facts in this case showed that this husband and wife were living apart when the order of February 20, 1946, was made. And by sub-s. 2 of s. 2: "Where a married woman with respect to whom an order has "been made under the principal Act resumes cohabitation "with her husband after living apart from him . . . . the

---

(1) [1948] K. B. 175.

"order shall cease to have effect on the resumption of such "cohabitation . . . ."

The justices found as a fact in this case, having listened carefully to the evidence, that there was no resumption of cohabitation, though it appeared that some attempt had been made to establish it. They found as a fact that there was none, and in those circumstances they were right in applying the provisions of s. 2, sub-s. 2, of the Act. I agree with the observations which have fallen from my Lord.

SELLERS J. I agree. The justices have found, and in my view rightly, that there was no resumption of cohabitation. It would seem on the facts that there was indeed here no residence of the parties together, though the justices have not expressly so found. This case, I think, differs from *Evans* v. *Evans* (1) and on the grounds which have been stated, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *John B. Purchase & Clark, for D. W. Peter Williams & Co., Swansea.*

(1) [1948] 1 K. B. 175.

C. G. M.

SWINDON CORPORATION v. PEARCE AND PUGH.

1948
May 27;
June 4.

Lord Goddard C.J., Birkett and Sellers JJ.

Town planning—Interim development control—Resolution to prepare a scheme under Town and Country Planning Act, 1932*—Street zoned as "intermediate," to be included in scheme—Development of land in street, prohibited by interim development authority—Appeal to court of summary jurisdiction—Jurisdiction—Consideration by justices of reasons actuating authority—Town and Country Planning (Interim Development) Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 29), *s.* 5 *and sch. I.*

An interim development authority, acting under s. 5 of the Town and Country Planning (Interim Development) Act, 1943, were satisfied that it was necessary or expedient to prohibit by order a development of land (consisting of the use of the land for a certain business) in an area with respect to which a resolution to prepare or adopt a scheme under the Town and Country Planning Act, 1932, was in force, carried out after the commencement of the Act of 1943 otherwise than in accordance with the terms of the Town and Country Planning (General Interim Development) Order, 1946. They thereupon gave notice to the occupiers of

1948

Swindon Corporation v. Pearce and Pugh.

the land, pursuant to s. 5, and sch. I. of the Act of 1943, of their proposal to make an order prohibiting this use of the land, since this use was not in accordance with provisions then proposed to be included in the scheme under which the use required the consent of the authority—a consent which had been refused on the ground that such use was injurious to the amenities of the neighbourhood, which was mainly residential in character. The occupiers appealed to a court of summary jurisdiction pursuant to s. 5 and sch. I.

Held that the court had no jurisdiction to consider the reasons which had led the authority to the conclusion that it was necessary or expedient to prohibit this use of the land.

CASE STATED by the appeal committee of Wiltshire quarter sessions.

Swindon Corporation were the interim development authority for the borough of Swindon for the purpose of the Town and Country Planning Acts. A resolution to prepare a scheme under the Town and Country Planning Act, 1932, was at all material times in force in respect of the borough. By resolution, dated April 3, 1945, the corporation approved and adopted the report of a post-war planning sub-committee set up by them to examine and make recommendations upon the planning of Swindon. By this report the area in which Crombey Street was situated was zoned "intermediate," which involved the prohibition of all uses of land or buildings, except for residential purposes, without the express consent of the corporation. Subsequently to the approval of this report and in conformity therewith it was proposed that the said zoning should be included in the scheme to be prepared for the borough under the Act of 1932.

The respondents, William Ivor Pearce and Colin Pugh, were the occupiers of 71, Crombey Street in the borough of Swindon. These premises consisted of a shop and dwelling-house combined with a yard and out-building adjoining. From July, 1946, the shop, yard and out-building were occupied by the respondents as partners in a second-hand motor vehicle business carried on therein. The premises were owned by the mother of the respondent Pearce. This user of the premises constituted a development of land within the meaning of the Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943.

By letter, dated August 1, 1946, the father of the respondent Pearce applied to the corporation for permission under s. 10 of the Town and Country Planning Act, 1932, to make use of the premises for the purpose of the business of motor car sales.

1948

SWINDON CORPORATION v. PEARCE AND PUGH.

By resolution, dated September 3, 1946, the corporation refused the application on the ground that the proposed change of user would be likely to injure the amenities of the neighbourhood, which was mainly residential in character. Thereafter, the respondent Pearce and his father appealed to the Minister of Town and Country Planning against the corporation's refusal of permission and the Minister caused a public local inquiry to be held before one of his inspectors on December 10, 1946. After consideration of the facts, the Minister by letter of March 8, 1947, informed the corporation and the respondent Pearce and his father that he had no jurisdiction to determine the appeal inasmuch as the development had been carried out prior to the application for permission. The above-mentioned user of the premises was commenced and continued without authority or permission under the Provisional Town and Country Planning (General Interim Development) Order, 1946.

At a meeting on June 3, 1947, the corporation, being satisfied that it was necessary or expedient to do so, having regard to the proposed zoning, resolved to prohibit by order the use of these premises for the purpose of a second-hand motor vehicle business, and accordingly, on June 17, 1947, caused to be served on the respondents (inter alia) a notice pursuant to s. 5, and sch. I of the Town and Country Planning (Interim Development) Act, 1943 (1). The notice recited that a

---

(1) By s. 5 of the Town and Country Planning (Interim Development) Act, 1943—" (1.) If " while a resolution to prepare or " adopt a scheme under the " principal Act is in force with " respect to any area, any development of land within that area " is carried out after the commencement of this Act otherwise " than in accordance with the " terms of the interim development order or of permission " granted under that order, then, " subject to the provisions of this " section, the interim development " authority may, if they are satisfied that it is necessary or " expedient so to do having regard " to the provisions then proposed " to be included in the scheme . . . . " (*b*) where the development consists of any use of the land or " any building thereon, by order " prohibit that use, and, where " necessary, reinstate the land " . . . ."

" (2.) The provisions of subsections (2.) to (5.) of section 13 " of the principal Act (which " provide for an appeal to a court " of summary jurisdiction against " action proposed to be taken under " that section) shall apply as set " out with modifications in the first " schedule to this Act in relation " to any action proposed to be " taken under this section."

By the First Schedule to the Act of 1943—

" Section 5. Appeals from " decision to exercise power to " enforce interim development " control."

1948
SWINDON CORPORATION v. PEARCE AND PUGH.

resolution to prepare or adopt a scheme under the Town and Country Planning Act, 1932, was in force with respect to an area comprising the land in question and that development of that land consisting of the use of that land and buildings thereon for the pupose of a second-hand motor vehicle business was being carried out after the commencement of the Act of 1943 otherwise than in accordance with the terms of the Town and Country Planning (General Interim Development) Order, 1946. The notice then stated that the authority was satisfied that it was necessary or expedient to prohibit that use having regard to the provisions which it was proposed to be included in the new scheme, and it accordingly notified the respondents that the authority proposed, after the expiration of twenty-eight days from the date of the service of the notice, to make an order prohibiting the aforementioned use of the land and buildings. The notice then set out that " the grounds for such " action are that the said use of the land is not in accordance " with provisions now proposed to be included in the scheme " under which the said use of the land and buildings requires " the consent of the interim development authority, which " consent has been refused on the ground that such use is " injurious to the amenities of the neighbourhood, which is

" 1. Not less than 28 days " before taking any action under " section 5 of this Act, the interim " development authority shall " serve a notice in the prescribed " manner on the owner and on the " occupier of the building or " land in respect of which the " action is proposed to be taken " and on any other person who, " in their opinion may be affected " thereby, specifying the nature of, " and the grounds upon which " they propose to take that action.

" 2. If any person served with " such a notice aforesaid desires " to dispute any allegation con- " tained therein, he may, by " written notice served on the " clerk of the court and on the " interim development authority " within 28 days from the date " of the service of the original " notice on him, appeal to a court " of summary jurisdiction for the " petty sessional division or place " within which the property to " which the notice relates is " situated, and the interim de- " velopment authority shall not " take the proposed action pending " the final determination or with- " drawal of the appeal."

" 3. If on any such appeal, the " court of summary jurisdiction " are satisfied that the interim " development authority are " entitled to take the proposed " action on the grounds specified " in the notice, they shall dismiss " the appeal and . . . . shall by " their order prohibit the building " or land from being used after " the period aforesaid without the " permission of the authority or in " contravention of any conditions " subject to which that per- " mission was granted, but, if they " are not so satisfied they shall " allow the appeal . . . ."

"mainly residential in character." The occupiers appealed to the court of summary jurisdiction for the borough, who allowed the appeal. The corporation appealed from this decision to quarter sessions.

It was contended by the occupiers that the right of appeal extended to all matters referred to in the corporation's notice to the respondents under s. 5, and sch. I, of the Act of 1943 and in particular to the issue as to whether the use of the land was injurious to the amenities of the neighbourhood and that the merits and justification on town planning grounds of the corporation's refusal and of their proposed action were in issue. The appeal committee were of opinion that this contention was well-founded and dismissed the appeal from the court of summary jurisdiction, subject to the opinion of the King's Bench Division on a case stated.

Harold B. Williams K.C. and *J. T. Molony* for the interim development authority. The decision of the authority as to the necessity for or expediency of the proposed action was conclusive and no inquiry could take place before the court of summary jurisdiction or the appeal committee as to the merits or justification on town planning grounds of the authority's refusal to permit this use of the premises. By their notice under s. 5 of, and sch. I to, the Town and Country Planning (Interim Development) Act, 1943, the authority stated that the use of the land was not in accordance with the provisions proposed to be included in the scheme under which this use of the buildings required the consent of the interim development authority, a consent which had been refused on the ground that such use was injurious to the amenities of the neighbourhood, which was mainly residential in character. The court of summary jurisdiction and the appeal committee had no jurisdiction to enter on the question, as they did, of the ground on which the authority had come to the conclusion that it was necessary or expedient to make the order prohibiting this use of the land, viz., that the use was injurious to the amenities of the neighbourhood, which was mainly residential in character. The authority were not bound to give in their notice any reasons for this conclusion.

By s. 5, sub-s. 2, of the Town and Country Planning (Interim Development) Act, 1943, the provisions of sub-ss. 2 to 5 of s. 13 of the principal Act (which provide for an appeal to a court of summary jurisdiction against action proposed to be taken under that section) were to apply, as set out with modifications in the first schedule to the Act of 1943 in relation to any action proposed to be taken under this section, i.e., in this case the prohibition of the use of this land for the purpose of a second-hand motor business. By para. 1 of sch. I the authority before taking action under s. 5 must serve a notice on the owner and occupier of the land "specifying the nature of and the grounds "upon which they propose to take that action." By para. 2 if any person served with such a notice desires to dispute any allegation contained therein, he may appeal to a court of summary jurisdiction and by para. 3: "If on any such appeal "the court of summary jurisdiction are satisfied that the "authority are entitled to take the proposed action on the "grounds specified in the notice, they shall dismiss the "appeal." The issue in this case is the meaning of these words in para. 3 of sch. I. It is submitted that they mean if the court are satisfied that the authority are entitled in law, having regard to the terms of s. 5. See the terms of s. 5, sub-s. I, of the Act of 1943, viz.: if any development of land is carried out "otherwise that in accordance with the terms of the interim "development order or of permission granted under that "order." But the limits of the jurisdiction of the court of summary jurisdiction are contained in para. 3. Is the court satisfied that the authority are entitled to take the proposed action on the grounds specified in the notice? If so, the court is to dismiss the appeal. They are "entitled" to take the proposed action only if the conditions precedent to the giving of the notice, which are stated in the notice, have been carried out, i.e., that a resolution to prepare or adopt a scheme under the Act of 1932 was in force with respect to the land in question, that there had been a development of the land within the meaning of the Act of 1932 and that this development of land, consisting of the use objected to was being carried out after the commencement of the Act of 1943, otherwise than in accordance with the terms of the Town and Country Planning (General Interim Development) Order, 1946, and that the authority were satisfied that it was necessary or expedient to prohibit this use of the land, having regard to the provisions now proposed to be included in the scheme.

In *Taylor* v. *Brighton Borough Council* (1) an interim development authority served on the appellant a notice under s. 5 of the Act of 1943 that it was their intention to prohibit the use

(1) [1947] K. B. 57 and 736.

1948

SWINDON CORPORATION v. PEARCE AND PUGH.

of premises as a fun fair on the ground that it was their intention to provide in the scheme that the use for a fun fair of land should not be commenced without the consent of the authority. The issue was, although the authority could provide in a scheme for the absolute prohibition of the use of the site as a fun fair, yet was it within their powers to prohibit such use conditionally on their consent being obtained? It was held inter alia that provided the provision was one which could lawfully be inserted in a scheme the question whether it was "necessary or expedient" to insert it under s. 11, sub-s. 1 (*a*) of the Act of 1932 was not a matter for the court, but for the authority, who had the ultimate control of the scheme (i.e., the Minister, and in the last resort, Parliament) and the court could decide only whether the proposal could be lawfully inserted in the scheme and not whether it was reasonable. See the observations of Lord Greene M.R. (1).

Under sub-s. 5 of s. 10 of the Act of 1932, the occupiers in the case before the court, if they had applied for permission to make this use of the land and the authority had refused that permission, had an absolute right of appeal to the Minister on the merits. Suppose the Minister dismissed the appeal. By the subsection: "The decision of the Minister on an appeal . . . . shall "be final and shall have effect as if it were a decision of the "authority," that is on the merits. It cannot be that the respondents still have a further appeal to a court of summary jurisdiction on the merits, i.e., as to whether the use is injurious to the amenities of the neighbourhood. The legislature cannot have given power to a court of summary jurisdiction, not only to overrule the interim development authority on this issue, but also to overrule the decision of the Minister. The decision of the appeal committee, upholding the decision of the court of summary jurisdiction, should be reversed.

N. J. Skelhorn for the occupiers. The appeal granted by s. 5, sub-s. 2 of the Act of 1943 would be a farce if the justices could not consider the merits. The sole issue would be whether the authority had complied with the statutory provisions, i.e., had their tackle in order. By para. 1 of sch. I to the Act of 1943, the authority must specify in their notice under s. 5 the grounds on which they propose to take their action under the section. They did so here and one of the grounds was that "the use" objected to "was injurious to the amenities of the "neighbourhood." Further by para. 2 the person served with

(1) [1947] K. B. 736, 742.

1948

SWINDON CORPORATION v. PEARCE AND PUGH.

the notice can appeal if he "desires to dispute any allegation "contained therein." Accordingly, the occupiers could appeal if they desired to dispute the allegations in the notice that the use of the land was injurious to the amenities of the neighbourhood in that the neighbourhood was mainly residential in character. And by para. 3 the court of summary jurisdiction are to dismiss the appeal only if they are satisfied that the authority "are entitled to take the proposed action on the "grounds specified in the notice." Compare the appeals granted by ss. 12 and 47 of the Act of 1932 to a court of summary jurisdiction on the merits, and on issues of a similar sort, where the ultimate decision is left to the justices.

Harold B. Williams K.C. replied.

Cur. adv. vult.

June 4. LORD GODDARD C.J. The judgment which I am about to read is the judgment of the court. The occupiers entered an appeal to the court of summary jurisdiction sitting at Swindon against the action proposed to be taken by the interim development authority in pursuance of the right of appeal given by s. 5 of the Town and Country Planning (Interim Development) Act, 1943, and sch. I thereto. The justices allowed the appeal and the interim development authority appealed to quarter sessions. The appeal committee dismissed the appeal, subject to a case stated for the opinion of the court.

None of the facts are in dispute with regard to the necessary steps taken by the authority, nor that the land and buildings were within an area in respect of which the scheme was in force. The question at issue is whether on the hearing of the appeal the justices were entitled to inquire into the reasons which moved the authority to serve the notice which they did, and in particular whether it was open to the justices to consider whether the use of the ground would be injurious to the amenities of the neighbourhood, and it would seem to follow, if the contentions of the occupiers are correct, that they would also be entitled to invite the justices to consider whether or not the neighbourhood was mainly residential in character. The development in question in this case was begun after the Act of 1943 came into force and after a resolution to prepare a scheme under the Town and Country Planning Act, 1932, was in force. Sub-section 2 of s. 5 of the Act of 1943 gives the same right of appeal as did sub-ss. 2 to 5 of s. 13 of the Act of 1932, with the modifications contained in sch. I to the Act of 1943.

It is contended on behalf of the appellants, the authority, that, on the plain construction of the provisions of the schedule, the appeal is limited to the question of whether the development authority are entitled to take the proposed action in the notice, and that that must mean whether the conditions precedent to their giving the notice have been carried out and whether the land is land to which the scheme applies. They conceded that the court could also inquire whether what had been done amounted to development within the meaning of s. 53 of the Act of 1932, whether it took place after the Act of 1943 came into force and whether it was otherwise than in accordance with the terms of the Town and Country Planning (General Interim Development) Order, 1946. The occupiers, on the other hand, contend that the justices are entitled to consider whether in their opinion the reasons given by the authority for coming to the decision that they have done were justified or not.

The first observation to be made in this connexion is that it is unnecessary for the notice to give any reasons for the refusal of the authority to consent to the use to which it is proposed to put the land. The notice must no doubt state that the authority are satisfied that it is necessary or expedient to prohibit the use and that they have refused to give their consent to its use, but they are not required to set out in the notice the reasons that moved them to refuse their consent. It would indeed be strange if, because they do so, the person aggrieved can ask the justices to take a different view and to say that the authority were wrong in refusing their consent. Mr. Harold Williams called our attention to s. 10 of the Act of 1932. Under that Act, where the Minister has made a general order in respect of interim development, an application for permission to develop the lanp may be made to a specified authority, who may grant the application unconditionally or subject to conditions, or may refuse the application. Thereupon the applicant may appeal to the Minister, whose decision is to be final. Suppose then the applicant, in defiance of that decision, proceeds to develop the land and the authority serve a notice on him under s. 5 of the Act of 1943 of their intention to make an order prohibiting that use and directing him to reinstate the land. If an appeal can be brought against that order and the justices be asked to reconsider the matter, it would be asking them in effect not only to overrule the authority but the Minister. In our opinion it is clear that the justices on this appeal can decide only whether the authority have acted within their

1948

SWINDON CORPORATION v. PEARCE AND PUGH.

jurisdiction, by which we mean in respect of land that is comprised within the order, and whether there has been development contrary to the order and whether the necessary steps requisite to be taken before a notice is given have been taken. There may be some other matters which the court can consider. We are not intending to give an exhaustive category, but in our opinion it is clear that the court cannot consider the reasons which have led the authority to come to the conclusion that it is necessary or expedient to prohibit the intent to develop.

In *Taylor* v. *Brighton Borough Council* (1), a case arising under the same Act, the Master of the Rolls said (2): "The test set "up by the word 'necessary or expedient' in my opinion is not "for the court to decide." It is true that he was there referring to provisions which it was proposed to be inserted in a scheme, but it seems to us that that observation applies with equal force to the matter which we are now considering. It is, we think, evident that Parliament meant these matters to be left to the decision of the elected local authority. It is for them to consider, and not for a court, what it is desirable should be done or not done in relation to these schemes; and, provided they are acting intra vires, their action cannot be controlled by the courts. It would have been very easy, if Parliament had intended that the decisions of the local authority on such matters should be open to contest before a court, to have used appropriate words giving that right.

Mr. Skelhorn called our attention to two sections in the Act of 1932, s. 12 and s. 47, which do expressly give a right to a court to override the decision of the authority in respect of the matters there mentioned; but we do not find any words which give this right in respect of matters relating to s. 5 of the Act of 1943. Where matters are left by Parliament to the discretion and judgment of a local authority, the courts ought not and indeed cannot interfere to overrule or vary what they see fit to do. I may perhaps in this respect mention a case in the Court of Appeal, *Dormer & Others* v. *Newcastle-upon-Tyne Corporation* (3). That case dealt with a different Act, a private Act, conferring powers on the corporation of Newcastle-upon-Tyne. The plaintiffs objected to the way the corporation had exercised the powers given them by the Act in relation to putting railings on the footway for the purpose of protecting foot passengers. In my judgment in that case I said (4):

---

(1) [1947] K. B. 736.

(2) Ibid. 742.

(3) [1940] 2 K. B. 204.

(4) Ibid. 218.

"The corporation, in the exercise of their discretion, came to "the conclusion that it was necessary for the protection of the "public in Newcastle that it should. I do not think that this "court, or any other court, has any right to canvass the "decision of a local authority on a matter of that sort which "Parliament has placed in their hands to decide. It is not a "question whether the Ministry of Transport, or the police, "or the watch committee, or anybody else, took this view or "that view. It is a question entirely for the corporation as a "corporation to decide: and they having come to a decision "with regard to the matter, it is not open, on a matter of that "sort, that the length or extent of this fence should be reviewed "by this or any other court." Exactly the same principles apply, we think, to this case. The justices, therefore, had no power to allow the appeal; and it follows that the order of the appeal committee in dismissing the authority's appeal was wrong. The case will be remitted to the appeal committee answering the question submitted by them, whether their ruling was correct in law, in the negative and an order must be made in the terms suggested in para. 8 of the case stated, that the appeal be allowed, the order of the appeal committee quashed and that the use of the premises be prohibited in the terms of the notice given by the interim development authority under s. 5 of the Act of 1943.

Appeal allowed.

Solicitors for the corporation: *Sharpe Pritchard & Co., for D. Murray John, Town Clerk, Swindon.*

Solicitors for the respondents: *Pennington & Son, for Lemon, Humphreys & Parker, Swindon.*

C. G. M.

HAMPS *v.* DARBY

C. A.

1948

June 29, 30: July 1, 2, 19.

Lord Greene M.R., Wrottesley and Evershed L.JJ.

Trespass — Racing pigeons — Damage to crops — Pigeons shot by farmer—Property in pigeons—Whether action maintainable by owner—Right of farmer to shoot trespassing birds in defence of his crops.

The plaintiff was a breeder of racing pigeons, and the defendant was a farmer. Some of the plaintiff's pigeons settled on the defendant's crop of peas, and did damage. The defendant, without firing a scaring shot, shot four of them and wounded a fifth. The county court judge having awarded the plaintiff 200*l.* damages, the defendant appealed.

Held (1.) that the plaintiff was entitled to maintain his action. Question of property in pigeons away from their dovecote discussed: dictum in note to Croke's Report of *Dewell* v. *Sanders* (1619) Cro. Jac. 490, held to be of doubtful authority. *Taylor* v. *Newman* (1863) 4 B. & S. 89, discussed.

(2.) that, on the facts of the case the county court judge was entitled to hold that the defendant had not discharged the onus laid on him by *Cresswell* v. *Sirl* [1948] 1 K. B. 241 of showing that he reasonably thought there was no other practicable means of getting rid of the birds.

APPEAL from Peterborough county court.

The defendant was a farmer, who at the material date had on his land a valuable crop of peas. The plaintiff kept racing pigeons as a hobby, his loft being about 1½ miles from the defendant's farm. It was the plaintiff's custom to release the pigeons daily for exercise, and they usually returned to the loft in about fifteen or twenty minutes. On April 27, 1947, the plaintiff released nine birds which settled on the defendant's peas, and did serious damage to the crop. The defendant, having shouted without succeeding in driving them away, got a gun, and without firing a scaring shot in the air, fired five shots, killing four birds and wounding a fifth, which, with the uninjured ones, managed to return to the plaintiff's loft. The plaintiff brought an action against the defendant in the county court and the judge awarded him 200*l.* damages. The defendant appealed.

Scott Cairns K.C. and *Stuart Horner* for the defendant. The county court judge ought not to have given damages against the defendant for shooting the plaintiff's pigeons when they were eating his crop of peas. The two questions that arise are (1.) whether in any circumstances it is a tort to shoot somebody else's pigeons on your own land, and (2.) whether in the circumstances of the present case the defendant was justified in shooting for protection of his crop of peas.

On the first of these points it is contended that for the purposes of an action for tort the pigeons were only the plaintiff's property while they remained on his land. They referred to *Dewell* v. *Sanders* (1) and to Blackstone's Commentaries, 21st ed., vol. 2, pp. 391, 394. Here the pigeons had strayed within the meaning of that passage. We do not admit that if the birds had not lost their animus revertendi when shot, the plaintiff had a sufficient jus proprietatis to maintain an action of trespass. Blackstone includes in the same category deer in a park, rabbits in a warren and so forth. We have found no case in which an action of trespass or trover was held to lie in respect of any of those animals away from the owner's land. Property ratione privilegii is ex hypothesi on the owner's land and therefore the question of animus revertendi does not arise. At common law there could be no larceny of pigeons, except from the dovecote.

---

(1) (1619) Cro. Jac. 490; 2 Rolle Rep. 3, 30.

[EVERSHED L.J. If there is any property in the plaintiff, must he not be entitled to protect it? And prima facie what you did infringed it.]

[LORD GREENE M.R. Rabbits, etc. do not pass to the executor—they pass with the land. But do not pigeons pass to the executor? He referred to Williams on Personal Property, 18th ed., p. 166.]

In Halsbury's Laws of England, vol. 1, 2nd ed. Tit. "Animals," ss. 913 and 914, Blackstone's category is adopted, and no case of trespass or trover is shown where the animal was not on the owner's land. *Fines* v. *Spenser* (1) was a decision on demurrer, because it was not alleged that the hawk was tame. *Reg*. v. *Cheafor* (2) is no authority for the proposition that there could be larceny of pigeons when they had left the dovecote. The next stage, so far as the criminal law is concerned, is contained in s. 21 of the Larceny Act, 1861, creating special statutory offences of stealing "any bird beast or other "animal ordinarily kept in a state of confinement or for any "domestic purpose, not being the subject of larceny at common "law" or wilfully killing any such bird, beast or other animal with intent to steal. Section 23 of the same Act provides "Whosoever shall unlawfully and wilfully kill, wound or "take any housedove or pigeon under such circumstances as "shall not amount to larceny at common law, shall, on con-"viction before a justice of the peace, forfeit and pay, over "and above the value of the bird, any sum not exceeding "two pounds."

In *Taylor* v. *Newman* (3) Blackburn J. indicates that the reason for the change was the peculiar difficulty of the position under the common law, and cites *Dewell* v. *Sanders* (4). They referred also to *Hudson* v. *MacRae* (5); *Horton* v. *Gwynne* (6);

---

(1) (1572) 3 Dyer 306.
(2) (1851) 5 Cox C. C. 367.
(3) (1863) 4 B. & S. 89.
(4) Cro. Jac. 490.
(5) (1863) 4 B. & S. 585.
(6) [1921] 2 K. B. 661

Cotterill v. *Penn* (1); *Woolwich* v. *Gataker* (2); *Farey* v. *Welch* (3). It is remarkable if there is such an action as is here contended for, that it is the first time it has been brought.

There is one ancient authority on rabbits (4) an anonymous case No. 580 in Moore.

As to the second point of defendant's right to protect his property, the judge was bound to find that defendant acted reasonably in the absence of evidence that he acted unreasonably.

[LORD GREENE M.R. Why? The onus is on the defendant.]

Van Oss for the plaintiff dealt, at the request of the court, with the second point first, and submitted that there was ample evidence to support the judge's findings. *Cresswell* v. *Sirl* (5) was reported after the hearing in the county court, but before the judge delivered his reserved judgment which showed that he had considered it. Even without that case there was authority for the judge's view in *Miles* v. *Hutchings* (6).

On the first point, it was desirable to clear away the criminal statutes and the cases under them. The view that the statutes were necessary because there was no property in pigeons was wrong. There was some doubt in the law as to the property in pigeons, and for the removal of doubt the statute was necessary, but the exact words of s. 23 are important, for "killing or wounding" in themselves obviously could never have amounted to larceny, and the passing of the Act really gets one no further.

[EVERSHED L.J. Can one derive any assistance from s. 41 of the Malicious Damage Act, 1861?]

Two points have been raised for the defendant (1.) that the shooting of pigeons is not a tort, and (2.) that even if it were, it would be a good defence that it was done on another's property in defence of his crops. Against this it is contended that a pigeon with an animus revertendi always remains the owner's property, whether in the air or on the property of some other person. This law was recognized until doubts arose by reason of *Dewell* v. *Sanders* (7). The matter is discussed in Glanville Williams on Liability for Animals, pp. 247, 250. Reliance here has been put on *Dewell* v. *Sanders* (7) as set out in an English translation but in the

(1) [1936] 1 K. B. 53.
(2) (1868) 32 J. P. 455.
(3) [1929] 1 K. B. 388.
(4) (1595) Moore (K. B.) 420.
(5) [1948] 1 K. B. 241.
(6) [1903] 2 K. B. 714.
(7) Cro. Jac. 490; 2 Rolle Rep. 3, 30.

original Norman French of Rolle's report (1) the case is more fully stated. In the old days many pigeons were wild and that is the whole explanation of this case, when the question was whether there was property in doves. These may be birds in which the animus revertendi was of a doubtful character.

[LORD GREENE M.R. The question seems to have been determined in the old days when the country was covered with dovecotes.]

It was only in comparatively recent times that pigeons could be shot owing to the nature of the weapons in use. Moreover the dovecotes generally belonged to monasteries, lords of the manor or parsons and there might then have been special ways of protecting the birds. In homing pigeons the animus revertendi is of a much more certain character, and the temporary absences involved were ignored by the law. *Dewell* v. *Sanders* (2) (1) is also reported under the title of the *Earl of Northumberland's* case (3). These other reports show not only that the English translation in Croke's reports was an abbreviated report of the case but also that it contained a note lacking the authority of the report itself which has been relied on in later cases. The real difference between the judges in that case was whether the doves were feræ naturæ or had the animus revertendi. In so far as this case could be taken to decide that pigeons with animus revertendi are feræ naturæ it should be treated as wrong. A case creating a difficulty is *Taylor* v. *Newman* (4), but then Blackburn J. relied on the note in *Dewell's* case (2) and he meant no more than that the question whether there was a right of property in pigeons was still open. In *Hudson* v. *MacRae* (5) the point made clear by Blackburn J. is that a crime was being charged for which a mens rea must be shown. His judgment then suggests that in *Taylor* v. *Newman* (4) he was dealing with the view that pigeons were feræ naturæ and that must mean that the pigeons were unreclaimed birds, so that the case had no application to pigeons with an animus revertendi. *Reg.* v. *Cheafor* (6) is in the plaintiff's favour. Other authorities are *Horton* v. *Gwynne* (7), *Farey* v. *Welch* (8) and *Cotterill* v. *Penn* (9). In the latter case high judicial authority (in particular Lord Hewart C.J.) has found great difficulty in deciding

(1) 2 Rolle Rep. 3, 30.
(2) Cro. Jac. 490.
(3) 79 E. R. 1242.
(4) 4 B. & S. 89.
(5) 4 B. & S. 585.
(6) 5 Cox C. C. 367.
(7) [1921[2 K. B. 661.
(8) [1929] 1 K. B. 388.
(9) [1936] 1 K. B. 53, 57.

what Blackburn J. meant in *Taylor* v. *Newman* (1). The explanation may be that Blackburn J. was in doubt as to the application of the Larceny Act, 1861, s. 23, and therefore gave the person charged the benefit of the doubt. Otherwise his decision ought to be treated as wrong. It is clear that from the earliest times property in pigeons was recognized when they were carrier pigeons and therefore had an animus revertendi. *Dewell's* case (2) is not contrary to this.

Scott Cairns K.C. in reply.

Cur. adv. vult.

July 19, 1948. LORD GREENE M.R. The judgment which is about to be read is the judgment of EVERSHED L.J. and myself.

EVERSHED L.J. This is an appeal by the defendant from a judgment and order of His Honour Judge Lawson Campbell sitting in the Peterborough county court, whereby he awarded a sum of 200*l.* to the plaintiff as damages for the destruction and wounding by the defendant of certain homing pigeons of which the plaintiff claimed the ownership and possession. It appeared that the plaintiff was a breeder of homing pigeons which he kept for the purpose, among other things, of racing. It also appeared that it was the practice of the plaintiff at certain times of the day to release his pigeons from his dovecote for exercise. On May 22, 1947, at about mid-day, the plaintiff, according to his custom, released nine of such pigeons. The pigeons in the course either of their outward or of their homeward journey alighted upon a field of the defendant and proceeded to feed upon his peas. The defendant thereupon shot at the birds. Four of them he killed. A fifth was wounded in the neck but made its way home. It is a significant point in the case (to which we later refer) that the defendant fired altogether five shots, four, according to an independent witness, in close succession and the fifth after an interval. As the defendant was using an ordinary double-barrelled sporting gun, it follows that he had been able to reload twice.

Mr. Scott Cairns, on behalf of the defendant, has put his case on alternative grounds. First, he says that by the law of England there is no property in homing, racing or tamed pigeons when out of their dovecote or loft such as will entitle

(1) 4 B. & S. 89.

(2) Cro. Jac. 490; 2 Rolle Rep. 3, 30.

the proprietor of the dovecote or loft to maintain an action for trespass or otherwise against him who has shot the birds. Second, he says that, assuming such a right of property, the destruction and wounding of the plaintiff's birds by the defendant was in fact justified upon the principle recently expounded by this court in regard to the shooting of dogs in *Cresswell* v. *Sirl* (1).

Upon the first point, although, as later appears, there can be found several statements in authoritative text-books, no case has been discovered in which the question has been directly the subject of a decision of the court. In these circumstances, Mr. Scott Cairns has strongly relied on the observations contained in Croke's report of the case of *Dewell* v. *Sanders* (2). The material part of the report, which is found at the end, following the word "Note," is as follows: "Note, that in the argument of this case, Justice Doderidge "said, that if pigeons come upon my land I may kill them, "and the owner hath not any remedy; but the owner of the "land is to take heed that he take them not by any mean "prohibited by the statutes: to which opinion Croke and "Houghton accorded. But Chief Justice Montague held the "contrary, and that the party hath jus proprietatis in them "for they are as domestics, and have animum revertendi, "and ought not to be killed; and for the killing of them an "action lies: but the other opinion is the best." From this note it is made clearly to appear that, in the opinion of three out of four of the judges concerned in the case, tamed or homing pigeons passed out of the property or possession of the proprietor of their dovecote and become "nullius bona" as soon as they had, upon their release, taken wing; and this effect is ascribed to the case by Dr. Glanville Williams in his book on Animals, though the author expresses the view that it is incorrect and against the weight of other authority (see p. 252). On the other hand, as Mr. Scott Cairns observes, the opinions attributed to the majority of the judges in Croke's Report have never been adversely criticized in any case which has, during the period of over 300 years since *Dewell* v. *Sanders* (2) was decided, come before the courts. In the circumstances, it has been necessary to examine the case of *Dewell* v. *Sanders* (2) somewhat closely.

It may in the first place be observed that the observations in the note which we have quoted were obiter. The facts in

(1) [1948] 1 K. B. 241.

(2) Cro. Jac. 490; 2 Rolle Rep. 3, 30.

Dewell v. *Sanders* (1) were that a court leet had imposed a fine upon the proprietor of a dovecote, the freeholder of the manor, on the ground that a conmon nuisance had been created by its erection; and, the fine not having been paid, distress had been levied upon the proprietor's assets. The proprietor proceeded to challenge the validity of the distress; and the real question in *Dewell* v. *Sanders* (1) was whether the court leet had any jurisdiction to make the award which it had made. The court answered the question in the negative. In answering that question it became relevant for the court to consider whether the erection or maintenance of a dovecote could amount either to a public or private nuisance: but, in our opinion, it is clear that the general question whether a man could have any jus proprietatis in flying pigeons was strictly irrelevant to the issue raised. For that reason, no doubt, the observations relied upon by the defendant are contained not in the report of the decision of the court itself but in a note appended to the decision.

But, in our opinion, it is at the least doubtful whether in fact the report in Croke accurately records the views expressed by the majority of the judges. Mr. Van Oss has drawn to our attention the further report (in the Norman French language) of the same case in the second volume of Rolle's Reports (2). From this report it appears that the observation of Doderidge J. to the effect that the pigeon when away from the dovecote could be lawfully destroyed, was subject to the important qualification that it was at the time doing damage; and both Doderidge J. and Houghton J. refer to the existence in the register of forms of writ appropriate to a claim for damages in respect of tamed pigeons when flying abroad. According to the Rolle Report, Croke J. alone—who was the editor of the reports bearing his name—propounded the view that tamed pigeons became nullius bona when away from their dovecote. In our view, therefore, the case of *Dewell* v. *Sanders* (3) cannot be regarded as providing reliable, still less convincing, authority for the view that no such right of property can exist in homing pigeons when in flight away from their loft as would support an action for damages for their destruction.

But Mr. Scott Cairns has further prayed in aid the terms of s. 23 of the Larceny Act, 1861, and certain decisions upon that section. The terms of s. 23 are as follows: "Whosoever "shall unlawfully and wilfully kill, wound, or take any house "dove or pigeon under such circumstances as shall not amount "to larceny at common law, shall, on conviction before a "Justice of the Peace, forfeit and pay, over and above the "value of the bird, any sum not exceeding two pounds."

---

(1) Cro. Jac. 490; 2 Rolle Rep. 3, 30.

(2) 2 Rolle Rep. 3, 30.

(3) Cro. Jac. 490.

The first case under the section came before Blackburn and Mellor JJ. in *Taylor* v. *Newman* (1). In that case Croke's report of *Dewell* v. *Sanders* (2) was cited. For present purposes the main significance of *Taylor* v. *Newman* (1) lies in this; that Blackburn J. after stating that it had been a matter of doubt whether there could be any right of property in homing pigeons on the wing, indicated his acceptance of the opinion ascribed by Croke to the majority of the judges in *Dewell* v. *Sanders* (2). The prosecution in *Taylor* v. *Newman* (1), in fact, failed; and in the later cases in which *Taylor* v. *Newman* (1) was considered (namely, *Hudson* v. *MacRae* (3), *Horton* v. *Gwynne* (4), *Farey* v. *Welch* (5), and *Cotterill* v. *Penn* (6)), there has been considerable discussion of the true grounds of the decision. In the first of them Blackburn J. himself expressed the view that it was based on the proposition that flying pigeons being feræ naturæ were not the subject of common law larceny, as the carrying off of a dog was not. In the last case, Lord Hewart C.J. said that the report must be regarded as unsatisfactory; and there is no doubt that since the date when *Taylor* v. *Newman* (1) was decided there has been considerable difficulty in determining its true ratio decidendi.

As regards Blackburn J.'s exposition of his former decision, we may observe that the terms of s. 23 of the Act of 1861 appear clearly to proceed upon the basis that homing pigeons (even when abroad) *may* be the subject of common law larceny. Had Parliament supposed, on the authority of the note to Croke's report of *Dewell* v. *Sanders* (2) or otherwise, that flying pigeons could in no circumstances be larcenable, we cannot help thinking that the section would have been differently worded. We may further observe that the question whether a bird or an animal is larcenable is wholly distinct from the question whether a right of property may subsist in it for the purposes of maintaining a civil action. In this respect

---

(1) 4 B. & S. 89.
(2) Cro. Jac. 490.
(3) 4 B. & S. 585.
(4) [1921] 2 K. B. 661.
(5) [1929] 1 K. B. 388.
(6) [1936] 1 K. B. 53.

Blackburn J.'s reference, by way of comparison, to the dog was not perhaps a happy one. For the dog is certainly not feræ naturæ. It is true that it could not be the subject of common law larceny; but that was because it was thought to be of no value for food or for profit. Beyond doubt, the owner of the dog had a right of property in it and could sue in the civil courts in respect of its loss.

In our judgment, consideration of the question of liability for larceny is by no means necessarily pertinent to the question of property. If, in the present case, the decisions on the Larceny Act lend any support to the defendant's argument, it must be on the ground not only that the decision in *Taylor* v. *Newman* (1) was rightly explained in the later case by Blackburn J., but that the basis of the decision was the absence of any proprietary interest in pigeons flying abroad and if that be the basis, then, as clearly appears from the judgment of Blackburn J. in *Taylor* v. *Newman* (1), it rests and depends upon the validity of the note to *Dewell* v. *Sanders* (2) in Croke's Report. Apart from the doubts which on other grounds have later been cast upon the soundness of the decision in *Taylor* v. *Newman* (1), its basis (on this view of it) would in any event be destroyed if the authority of Croke's note is successfully challenged. It comes back again, therefore, to the same point with which we have already dealt above.

It follows, in our view, that the cases upon which Mr. Scott Cairns has relied are of doubtful authority for the proposition for which he has cited them. On the other hand, there is, in our judgment, compelling authority to the opposite effect. In the case of *Dewell* v. *Sanders* (3) (Rolle's Reports) itself there is a reference to Bracton, to the effect that proprietorship in tamed pigeons remains so long as they retain in fact an animus revertendi to the control of the proprietor of their dovecote " columbæ nostræ sunt eo usque habent animi (*sic*) " revertendi." The matter is, moreover, treated at length in Blackstone's Commentaries, 8th ed., vol. II., at p. 391. " A qualified property may subsist in animals feræ naturæ per " industriam hominis ; by a man's reclaiming and making them " tame by art, industry and education ; or by so confining them " within his own immediate power that they cannot escape " and use their natural liberty " ; and a little later on : " Our " law apprehends the most obvious distinction to be between

---

(1) 4 B. & S. 89.

(2) Cro. Jac. 490.

(3) 2 Rolle Rep. 3, 30.

"such animals as we generally see tame and are, therefore, "seldom, if ever, found wandering at large, which it calls "domitæ naturæ, and such creatures as are usually found at "liberty which are, therefore, supposed to be more emphatically feræ naturæ, though it may happen that the latter "shall be sometimes tamed and confined by the art and "industry of man. Such as are deer in a park, hares or rabbits "in an enclosed warren, doves in a dovehouse, pheasants or "partridges in a mew, hawks that are fed and commanded "by their owner, and fish in a private pond or in trunks. "These are no longer the property of a man than while they "continue in his keeping or actual possession; but if at any "time they regain their natural liberty his property instantly "ceases, unless they have animum revertendi, which is only "to be known by their usual custom of returning . . . . The "law, therefore, extends this position farther than the mere "manual occupation; for my tame hawk that is pursuing his "quarry in my presence, though he is at liberty to go where "he pleases, he is nevertheless my property; for he hath "animum revertendi. So are my pigeons, that are flying at "a distance from their home (especially those of the carrier "kind) and likewise the deer that is chased out of my park "or forest and is instantly pursued by the keeper or forester; "all which remain still in my possession and I still preserve "my qualified property in them, but if they stray without "my knowledge and do not return in the usual manner it is "then lawful for any stranger to take them." Then again a little later: "In all these creatures reclaimed from the "wildness of their nature the property is not absolute but "defeasible; a property that may be destroyed if they resume "their ancient wildness and are found at large. For if the "pheasants escape from the mew, or the fishes from the "trunk, and are seen wandering at large in their proper "element, they become feræ naturæ again and are free and "open to the first occupant that has ability to seize them. "But while they thus continue my qualified or defeasible "property they are as much under the protection of the law "as if they were absolutely and indefeasibly mine: and an "action will lie against any man that detains them from me "or unlawfully destroys them."

Reference may also be made to Sir William Holdsworth's History of English Law, vol. 7, p. 489: "But it is clear "that from an early date (perhaps under the influence of

"Roman Law) it was recognized that property could exist "in animals feræ naturæ which had been tamed:" and later on the same page the learned author observes: "Brooke J. "pointed out (1) that the fact that such animals were not the "subject of larceny did not prevent them from being the "subject of private ownership, if they were in any way useful "to mankind." And after a reference to our first father Adam, the citation proceeds: "' . . . . and when I have taken "' fowls and by my industry have made them tame through "' the restraint on their liberty, now I have a special property "' in them, because they are made obedient to me by my "' labour, and then it is not lawful for anyone to take them "' . . . . For if I have a singing bird, though it be not "' pecuniarily profitable, yet it refreshes my spirits and gives "' me good health, which is a greater treasure than great "' riches. So if any-one takes it from me he does me much "' damage for which I shall have an action '."

But if it is established that there may be a special property in tamed or reclaimed pigeons, there remains the question, what form of action may be maintained in respect of them? In the report in 2 Rolle of the case of *Dewell* v. *Sanders* (2), reference is made to the forms of action, to be found in the Register (3), available to the proprietor of tamed pigeons; and these are mentioned by Dr. Glanville Williams in his note (1.) on p. 248 of his book. From these references, it is, in our judgment, clear that the proper form of action in such a case as the present is that of trespass to goods; for so long as the bird in fact retains its animus revertendi to the proprietor's dovecote, it is deemed to be in the proprietor's possession. The point is clearly and concisely stated in Pollock & Wright on Possession in the Common Law at p. 231 in the following terms: "An animal once tamed or reclaimed may continue "in a man's possession although it fly or run abroad at its "will if it is in the habit of returning regularly to a place "where it is under his complete control. Such habit is "commonly called animus revertendi."

It follows, therefore, in our judgment, that the owner of tamed or reclaimed pigeons continues to have property in and possession of his birds after they have flown from his dovecote, so long as the birds retain in fact an animus revertendi to his control. In the present case it was, in our judgment, clearly proved—and the learned county court judge held—that such animus revertendi subsisted in the pigeons which the defendant shot. The plaintiff is, therefore, in our view, entitled prima facie to maintain his action in respect of their destruction and wounding. The first ground relied upon by the defendant, therefore, fails.

---

(1) (1521) Y. B. 12 Hy. VIII., Trin. pl. 3.

(2) 2 Rolle Rep. 3, 30.

(3) Registrum Omnium Brevium, first published in 1531 and said by Lord Coke to be the most ancient book in the English law.

There remains, however, the second question, whether the defendant, though prima facie liable for the destruction of, and damage to, the plaintiff's property, can justify the action which he took. If we are right upon our conclusion on the first point, it is conceded that the test to be applied is the same as that applicable to the destruction of other animals in the possession and proprietorship of another; the test recently laid down by this court in the case of a dog in *Cresswell* v. *Sirl* (1). The learned county court judge quoted the relevant passage in the judgment of this court which formulates the test, and it is convenient to quote it again in this judgment (2). "We think the relevant rules of law may be thus stated: "(1.) the onus of proof is on the defendant to justify the "preventive measure of shooting the attacking dogs. (2.) He "has, by proof, to establish two propositions, but each "proposition may be established in either of two ways: "*Proposition No.* 1: That at the time of shooting, the dog was "either (*a*) actually (in the above sense) attacking the animals "in question, or (*b*) if left at large would renew the attack so "that the animals would be left presently subject to real and "imminent danger unless renewal was prevented. *Proposition* "*No.* 2: That either (*a*) there was in fact no practicable means, "other than shooting, of stopping the present attack or "preventing such renewal, or (*b*) that the defendant, having "regard to all the circumstances in which he found himself, "acted reasonably in regarding the shooting as necessary for "the protection of the animals against attack or renewed "attack." His Honour's judgment then proceeded as follows: "Can the defendant in the present case sustain this onus "which lies on him? I do not think he can. It is true that, "at the moment of shooting, the pigeons were on the ground "and feeding on the crop so that the defendant establishes "proposition (1.), but I think he fails to establish either limb "of proposition (2.). The view I formed not only from the "evidence given by the defendant but from the way he gave

---

(1) [1948] 1 K. B. 241.

(2) Ibid. 249.

"it, was that he never directed his mind at all to the question "whether the pigeons were tame or wild or whether there was "any practicable way of getting them off the crops other than "shooting them. He had seen pigeons on this field before "and realized there would result some damage to his crop; "and he shot without further consideration. He has, in my "view, entirely failed to establish shooting as the only "practicable means and I think a reasonably careful man "would have made at least some examination to discover "whether the birds were wild or not and would, unless clearly "satisfied they were wild, have tried the effect of a scaring shot "before killing the birds as an ultimate resort. I was informed, "and accept, that there is no great difficulty in distinguishing "between wild and homing pigeons in a good light and at fairly "close range both of which advantages the defendant had."

There can be no doubt that prima facie the questions which the learned judge posed and answered are questions of fact; and prima facie his findings cannot be challenged in this court. But Mr. Scott Cairns has sought to persuade us to depart from the general rule on one or both of the grounds which are open to him in this court, namely, that the judge misdirected himself as a matter of law, and that there was no evidence on which his conclusions could be supported. He summarized his argument in the course of his reply as follows: First, that there was no evidence that the defendant had not directed his mind to the question whether there was any other practicable way of protecting his property: second, that the uncontradicted evidence of the defendant as to his having shouted at the birds was not found by the judge to be untrue and there was no evidence that any other form of noise—particularly a scaring shot—was likely to have been more effective to drive the birds away; and, third, that the finding of unreasonable conduct on the defendant's part was vitiated by the introduction of the irrelevant question: Had the defendant been unreasonable in not trying first to observe whether the birds were wild or tame? On one or other of these grounds Mr. Scott Cairns contended that the case ought to be remitted to the county court for re-hearing.

Now at the time when the action was heard the decision of this court in *Cresswell* v. *Sirl* (1) had not been given. A full report of the case and of the judgment had, however, been published before the county court judge gave his judgment

(1) [1948] 1 K. B. 241.

in the present case; and, as appears from his judgment, there is no doubt that he considered and purported to apply the tests which *Cresswell* v. *Sirl* (1) laid down. Mr. Scott Cairns has, nevertheless, argued that, since *Cresswell* v. *Sirl* (1) had not been decided at the date of the trial, it cannot fairly be said that the evidence and arguments were properly directed at the trial to what have since been shown to be the real questions for determination. We do not think this criticism can be sustained. There is no doubt from the pleadings and the judge's notes that upon this part of the case both evidence and argument were directed to the general question whether the defendant could justify what he had done, and this general question necessarily involved consideration of practicable alternatives and reasonableness on the defendant's part. When the learned judge came to deliver his judgment, and had before him the precise tests to be applied, he was, in our view, both justified and entitled to reach the appropriate conclusions on the basis of the evidence he had heard. There is no hint or suggestion in his judgment that the decision in *Cresswell* v. *Sirl* (1) had raised questions not covered by the evidence at the trial. An examination of the notes of the evidence shows equally, in our view, that all the relevant matters of fact were fully canvassed.

We next observe that the onus of proving justification for the shooting lay upon the defendant. The judge stated in plain terms that in his view the defendant had failed to discharge the onus: " . . . . I think he fails to establish " either limb of proposition (2.)." Mr. Scott Cairns' first head of complaint appears to us to fail to appreciate that the onus lay upon his client. The question was not whether the negative was shown that the defendant had not directed his mind to practicable alternatives, but whether the defendant, in order to make good the second limb of proposition (2.), had shown that he had. Mr. Scott Cairns' second head of complaint is, we think, open to the same objection. Nor is that all. The defendant, in his evidence in chief, had indeed said that when he saw the birds he " walked across field and " made noise to scare them. They didn't go so I got gun." But from his cross-examination it appears that when the defendant first saw the birds he was on the far side of the field from them and that when he made a noise they got up, though (apparently) they again settled; and that having got the gun he then approached the birds from the other side of the field nearest to them. It is true that there is no express reference in the judgment to this evidence, but it cannot, in our judgment, be said that the county court judge is bound to deal in his judgment with every piece of evidence given and state whether or not he accepted it.

---

(1) [1948] 1 K. B. 241.

Upon both the first and second heads of Mr. Scott Cairns' complaint the question which the judge was putting to himself was not whether a scaring shot would have driven the birds away but whether in the absence of such a shot the defendant could discharge the onus of showing either (*a*) that there was no practicable means of protecting his property other than by shooting to kill or (*b*) that the defendant reasonably thought that there was no other such practicable means. In our opinion so far from this being a misdirection, it was a perfectly correct way of approaching the question. The judge is not in our view finding by implication that a scaring shot would have been successful. It was quite unnecessary for him so to find. We understand his judgment as meaning merely that so far as (*a*) is concerned killing was not shown to be the only practicable means of defence in the absence of demonstration that scaring was or would have been ineffective; and, so far as (*b*) is concerned, a reasonable man would not have proceeded to kill before trying the effect of a scaring shot. The absence of evidence as to whether a scaring shot would or would not have been effective is accordingly, in our view, irrelevant. Evidence was not, we think, necessary before the judge would be entitled to take the common-sense view that the every-day expedient of a scaring shot ought to have been tried.

The third head of Mr. Scott Cairns' complaint may be said to raise a matter of law, namely, whether consideration of the question, ought the defendant to have attempted first to discover whether the birds were wild or tame, amounted to a misdirection. In our judgment, it cannot be said that in this respect the learned judge in any way misdirected himself. In our judgment, in approaching the second limb of the second proposition in *Cresswell* v. *Sirl* (1) (namely, whether the defendant reasonably thought that there was no practicable means, other than shooting to kill, of protecting his property), it was in the circumstances relevant to consider whether the defendant had applied his mind at all to the character of

(1) [1948] 1 K. B. 241.

the birds. We agree that the question whether the birds were valuable or not was beside the point; and there is nothing in the judgment to suggest that the judge concerned himself with value. But it seems to us impossible to hold that, in deciding whether or not the defendant had discharged the onus upon him, the judge was not properly entitled to consider if the defendant, in making up his mind what steps he should take, thought at all whether the birds were wild birds (which he was entitled to shoot at sight) or tame birds (which prima facie he was not); and all the more since upon this point there was obviously some inconsistency in the defendant's own evidence.

Mr. Scott Cairns concentrated in his argument primarily upon the second limb of the relevant proposition. But he also contended that upon the evidence there was shown to be no practicable alternative in fact to shooting the birds for the protection of the defendant's property—or, at least, that there was no evidence to the contrary effect. Upon this part of the case Mr. Scott Cairns particularly relied upon the circumstance, already noticed, that the defendant had apparently had time to reload twice and to fire, in all, five shots at the birds. We were, accordingly, asked to infer, necessarily, that a scaring shot would not in fact have been effective to drive the birds away. It is, no doubt, true that the operation of firing five shots and reloading twice takes an appreciable period of time. On the other hand, it cannot, we think, be assumed that the effect of shots fired to kill is necessarily the same as that of scaring shots. Much obviously might depend upon the number of birds in fact hit by the first shot or shots. However that may be, the judge found as a fact that the defendant had "entirely failed to establish "shooting as the only practicable means," and it seems to us impossible to say that such a conclusion was one at which, upon the evidence including the evidence of the number of shots fired, the judge could not properly arrive.

It follows, therefore, in our judgment, that it is impossible to disturb the conclusions of the judge that the defendant had failed to discharge the onus laid upon him. It is hardly necessary to add that we are concerned only with the facts of this particular case and with the judge's conclusion in this case upon those facts. We must not be taken to be laying down any general rule (apart from the proposition enunciated

C. A.

1948

HAMPS *v.* DARBY.

Evershed L.J.

in *Cresswell* v. *Sirl* (1)) which will be decisive of other cases in which farmers may shoot pigeons feeding upon their crops. On the evidence as recorded in this case, we can well understand that another judge might have reached a different conclusion. But that circumstance does not justify our interference with the judge's finding; and we do not forget that we have not had the advantage, afforded to the judge, of seeing the defendant in the witness box—a matter which, as we read the judgment, was of no little importance in the present case.

The result is that, in our judgment, this appeal fails and, as there is no question of the quantum of the damages awarded, the judgment of the county court should be affirmed accordingly.

WROTTESLEY L.J. Upon the question whether the plaintiff had such property in the pigeons which were killed while feeding on the defendant's peas as to entitle him to bring an action for trespass to goods against the killer, I have had the advantage of reading the judgment read by EVERSHED L.J., and I am in agreement with it, and cannot usefully add anything to it.

As to the question whether the defendant was justified in shooting these pigeons, in order to protect his young peas, the relevant facts appear to me to be as follows: The plaintiff breeds and races racing pigeons for a hobby at his home in the town of Peterborough. He had twenty birds. From the evidence called on his behalf, it appears that, when they are well fed at home, these pigeons do not feed when out on exercise. It also appears that when let out for exercise they should be away only fifteen or twenty minutes. But, of course, if they do feed on the neighbouring farms they are later in returning. The nine birds let out on this occasion (May 22) would appear not to have been properly fed, for they did not return, and an hour after they were let out were still devouring the defendant's peas, 1½ miles away.

The defendant is by trade a farmer in partnership with his mother, and at the end of April had drilled, among other fields, a 5-acre field with peas. He had seen pigeons attacking this particular field before, and, to use the judge's own words, "realized there would be some damage to his crop." I have no reason to suppose the judge did not accept the defendant's evidence that they were there every day; nor that on this particular day he saw these very pigeons on this field, and made a noise to scare them. But they did not go, so he got his gun. For that would square with the plaintiff's evidence that these pigeons stayed out from 12 noon to 1 p.m. instead of returning at 12.20 p.m. or thereabouts to their loft. The defendant appears to have walked up to the pigeons, who did not go away. He fired five shots at them, and hit five birds. Four were killed and one was wounded but was able to fly back to the loft. I cannot find any trace in the note of a suggestion at the trial that the defendant's duty was first of all to fire a scaring or warning shot. And there is reason to think this was not put to the defendant when he was in the box.

---

(1) [1948] 1 K. B. 241.

When the county court judge delivered his judgment, he based himself on the decision of this court in *Cresswell* v. *Sirl* (1), and held that the duty of the defendant was, first, to direct his mind to the question whether the birds were tame or wild, or whether there was any practicable way of getting the birds off his crop other than shooting them. The county court judge went on to hold that in his view the defendant had "entirely failed to establish shooting as the only "practicable means," and that he thought "a reasonable man "would have made at least some examination to discover "whether the birds were wild or not and would, unless clearly "satisfied they were wild, have tried the effect of a scaring "shot before killing the birds as an ultimate resort."

The gist of this decision appears to me to be that the defendant ought to have fired a warning shot, and that that by itself would have scared the pigeons, so that they would have gone and not returned; and as he did not he had no justification for firing at and killing and wounding the pigeons, and so must pay 200*l.* to the owner of the marauding pigeons. I should have been more readily satisfied of this but for the fact that after four shots from a double-barrelled 12-bore gun, including at least two periods for reloading, which apparently killed or wounded four birds, there were still some of the plaintiff's pigeons for the defendant to shoot at, that is to say, within 40 or 50 yards. We are not, I suppose, as judges, forbidden to know something of the range at which birds like pigeons are likely to be killed or wounded with shot guns. Moreover, we know from one of the plaintiff's own witnesses that after the first four shots there was such a pause as to be

(1) [1948] 1 K. B. 241.

C. A.
1948
HAMPS
v.
DARBY.
Wrottesley L.J.

noticed by that witness. Yet still the pigeons appeared to have lingered in shot of the defendant. This rather remarkable phenomenon may be regarded as throwing, at any rate, some doubt on the suggestion that after one scaring shot these birds would have flown away and left the defendant's peas alone. For what actually transpired when the defendant did fire a shot seems to show that shooting to kill was the only practicable, and certainly the only efficacious, way of getting rid of the birds. For this purpose, a shot fired to kill was just as much a scaring shot as a shot fired in the air. More than one such shot I cannot believe that a busy farmer can be expected to fire; he has, of course, his living to earn and plenty to do without chasing marauding pigeons, however valuable, from one end of his field to the other, or paying for labour to scare tame pigeons which are not properly fed at home.

On the other hand, this is an appeal from a county court, in which the judge is the final judge of all questions of fact, unless it can be said that no reasonable man could have come to the conclusion at which the judge arrived on the material before him. I am not prepared to go as far as this. Even though the matter of the scaring shot was not put to the defendant, which was unfortunate, it is an act sufficiently obvious (in the light of the decision in *Cresswell* v. *Sirl* (1)), to justify the county court judge in considering it as a means of saving the crop, even though no evidence was called to deal with the point specifically. Nor can I say that the county court judge misunderstood the test which he applied, namely, the law as laid down in *Cresswell* v. *Sirl* (1). But those propositions must, I think, be applied reasonably; especially bearing in mind where the burden of proof is laid.

For instance, the burden of establishing the negative proposition that there was no practicable means of saving the stock or crop under attack except by shooting (that is, to kill) may become a very difficult, or even impossible, burden to discharge. Strictly, all the farmer can say usually is: "I could not think on the spur of the moment of any alternative that was likely to be effective." Beyond that, all is likely to be surmise. Farmers cannot, I think, be called upon to stand and watch their stock or crops being destroyed while they endeavour to calculate the possibilities which may be put to them at a trial on behalf of the owner of the marauding dog or pigeon.

---

(1) [1948] 1 K. B. 241.

Appeal dismissed :
Leave to appeal.

Solicitors for defendant : *Ellis & Fairbairn, for J. Hunt, Peterborough.*

Solicitors for plaintiff : *Oldman Cornwall & Wood Roberts for Greenwoods, Peterborough.*

J. W. H.

W. T. LAMB & SONS *v.* RIDER

C. A.
1948
June 14, 16, 30 ; *July* 7.

Scott L.J. and Romer J.

Jurisdiction—Limitation of proceedings—Execution—Action upon a judgment—R. S. C. Or. 42, *r.* 23 (*a*)—*Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21) *s.* 2, *sub-s.* 4.

R. S. C. Or. 42, r. 23 (*a*), which provides that where six years have elapsed since the date of a judgment, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to levy execution, is not rendered invalid by the provision of s. 2, sub-s. 4 of the Limitation Act, 1939, that an action (which by s. 31 of the Act includes any proceeding in a court of law), on a judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable. Or. 42, r. 23 (*a*) deals solely with execution which is essentially a matter of procedure for the purpose of enforcing a judgment when obtained, while s. 2, sub-s. 4 of the Limitation Act, 1939, is concerned with the right to sue on a judgment and the effect of the definition of " action " in that sub-section as including any proceeding in a court of law is not to merge the two together. A plaintiff, therefore, who has obtained a judgment more than six years ago, is not entitled to issue execution on it except with the leave of the court or a judge as provided by Or. 42, r. 23 (*a*).

Where an application for leave to issue execution pursuant to Or. 42, r. 23 (*a*) is refused, that fact does not, of itself, prevent the making of a subsequent application for the same relief on the ground that the matter is res judicata, but the second application should only be granted if it is founded on material which was not before the court on the occasion of the former application.

INTERLOCUTORY APPEAL AND CROSS-APPEAL from Pritchard J.

On November 14, 1938, the plaintiffs, W. T. Lamb & Sons, by a specially endorsed writ, claimed from the defendant, R. F. Rider, the sum of 500*l.* 6*s.* 6*d.*, being the balance of the price of goods sold and delivered and, on the failure of the defendant to appear, the plaintiffs signed judgment against him under Or. 14, r. 1, for the amount of their claim with costs. The judgment was not satisfied, but no steps were taken by the plaintiffs to enforce it until March 25, 1946, when they issued a summons in the action under the Courts Emergency Powers Act, 1943, asking for leave to proceed to execution or otherwise to the enforcement of the judgment which they had obtained on December 8, 1938, notwithstanding that six years had elapsed since such judgment, the latter part of the relief sought by the summons being referable to R. S. C. Or. 42, r. 23 (*a*) (1). The summons came before the master on May 7, 1946, when he refused leave to the plaintiffs to proceed under Or. 42, r. 23 (*a*). No appeal was entered by the plaintiffs against this order, but on April 6, 1948, they issued a further summons identical in form with that of March 25, 1946. On May 4, 1948, the master gave leave to the plaintiffs to proceed under Or. 42, r. 23 (*a*). The defendant appealed to Pritchard J. who rescinded the master's order giving leave to the plaintiffs to proceed, but gave them leave to appeal out of time against the original order of May 7, 1946. The defendant appealed from that part of the order of Pritchard J. which gave leave to the plaintiffs to appeal out of time against the order of May 7, 1946, and the plaintiffs appealed against the reversal of the master's order giving them leave to proceed under Or. 42, r. 23 (*a*) notwithstanding that six years had elapsed since the judgment in the action.

Gilbert Dare for the defendant, appellant in the first appeal. Pritchard J. was right in rescinding the master's order of May 4, 1948, giving leave to the plaintiffs to proceed under Or. 42, r. 23 (*a*), since the issue was res judicata, having been determined by the previous order of May 7, 1946. When an issue has once been determined between litigants in a lis, the unsuccessful party cannot pursue the matter before another judge, save only in the case of an application for habeas corpus.

(1) R. S. C. Or. 42, r. 23: "In "the following cases, viz.: "(*a*) Where six years have elapsed "since the judgment or date of the "order, or any change has taken "place by death or otherwise in "the parties entitled or liable to "execution; . . . . the party "alleging himself to be entitled to "execution may apply to the court "or a judge for leave to issue "execution accordingly. And "such court or judge may, if "satisfied that the party so "appying is entitled to issue "execution make an order to that "effect . . . ."

The judge was wrong, however, in giving the plaintiffs leave to appeal out of time against the original order of May 7, 1946. There was no application by the plaintiffs before Pritchard J. to extend the time for appealing, since the question before him related to the master's order of May 4, 1948, and to nothing else. Even if the plaintiffs had asked for leave to appeal against the original order, there was no fresh evidence before Pritchard J. which would have entitled him to exercise so exceptional a discretion in their favour.

Edward Terrell for the plaintiffs. There was no question of res judicata in this case. The dismissal of a summons under Or. 42, r. 23 (*a*) does not of itself bar a second application for the same relief provided that there was material before the court on the second application which was not before it on the first. Pritchard J. was wrong on the facts before him in holding that the matter was res judicata. He was, however, acting within his jurisdiction in granting the plaintiffs leave to appeal against the master's order of May 7, 1946, refusing their first application. (See Or. 64, r. 7.) If both these points are decided against the plaintiffs, it is submitted that the provisions of Or. 42, r. 23 (*a*) are invalid. By that rule where six years have elapsed since the date of a judgment the party alleging himself to be entitled to execution may apply to the court for leave to issue it. The rule, which in its present form dates from 1883, is now in conflict with a statute, viz., the Limitation Act, 1939, which provides in s. 2, sub-s. 4, that "an action "shall not be brought upon any judgment after the expiration "of twelve years from the date on which the judgment became "enforceable." By s. 31, "Action includes any proceeding "in a court of law including an ecclesiastical court." The execution of a judgment is a proceeding in a court of law and consequently an action, which, by s. 2, sub-s. 4 of the Limitation Act, may be brought within twelve years from the date on which the judgment became enforceable. In view of the provisions of s. 2, sub-s. 4, Or. 42, r. 23 (*a*) is no longer valid and the plaintiffs are entitled to issue execution within twelve years of the judgment and such right to execution is not subject to the discretion of the court as is the case under the rule. The recent case of *Lougher* v. *Donovan* (1) is an authority in the plaintiffs' favour on this point.

Gilbert Dare was not called upon to reply.

Cur. adv. vult.

---

(1) [1948] 2 All E. R. 13.

C. A.

1948

W. T. LAMB & SONS v. RIDER.

July 7. The judgment of the court was read by SCOTT L.J. The point which we propose to consider first is whether the judge acted rightly in rescinding the order which the master had made giving leave to the plaintiffs to proceed under Or. 42, r. 23 (*a*) notwithstanding that six years had elapsed since the date of the judgment. The defendant's appeal from the master's order to the judge in chambers was, as we understand, founded on the view that, having regard to the order which the master had made dismissing the plaintiffs' similar summons some two years previously, the matter was res judicata and could not be reopened. We do not know whether this was the view on which the judge acted, but we do not think that it was right. The dismissal of a summons for relief under Or. 42, r. 23 (*a*) does not, in our opinion, of itself shut the door against a subsequent application for the same relief. On the other hand, the subsequent application should only be granted if founded upon material which was not before the court on the first occasion; and the question accordingly is whether the master was right in acceding to the plaintiffs' second application having regard to the evidence by which it was supported. In our judgment there was no sufficient evidence to justify the order which the master made and Pritchard J. acted rightly in rescinding it.

Next comes the question whether the judge was right in giving the plaintiffs leave to appeal out of time against the dismissal by the master of their earlier summons by the order made on May 7, 1946. This matter was not really before the judge at all. The subject matter that was before him was the plaintiffs' summons of April 6, 1948, and nothing else; and neither in that summons nor in the plaintiffs' evidence in support of it was there any suggestion that the plaintiffs were dissatisfied with the master's order of two years before. The granting of leave to appeal out of time is, of course, a matter of discretion and we are not at all suggesting that the discretion can never be exercised except where there is evidence to support it. The order in question, however, had been made more than two years previously and the plaintiffs were not even in the application then before the court asking for leave to appeal from it. In these circumstances, we are of opinion that before such leave was granted the plaintiffs should have been required to adduce evidence explanatory of their long delay and the defendant should have been given an opportunity of answering it. In our judgment, accordingly,

C. A.

1948

W. T. Lamb & Sons v. Rider.

this court should hold that there was not before the learned judge evidence of new facts sufficient to entitle him to exercise so exceptional a discretion in favour of the plaintiffs : indeed, if need be, we should feel bound to hold that his order was unfair to the defendant and on that ground must be set aside.

As we have arrived at conclusions adverse to the plaintiffs on both of the points which we have been considering, it becomes necessary to deal with the final argument which Mr. Terrell addressed to us on the plaintiffs' behalf which is founded upon the alleged invalidity of R. S. C. Or. 42, r. 23 (*a*). This rule in its present form dates back to 1883 and the argument for the plaintiffs on this appeal is to the effect that it is in conflict with s. 2, sub-s. 4, of the Limitation Act, 1939, and must therefore be treated as ineffective. Section 2, sub-s. 4, of that Act is as follows : " An action shall not " be brought upon any judgment after the expiration of " twelve years from the date on which the judgment became " enforceable, and no arrears of interest in respect of any " judgment debt shall be recovered after the expiration of " six years from the date on which the interest became due." The definition of " action " in s. 31 of the Act is in the following terms : " ' Action ' includes any proceedings in a court of " law, including an ecclesiastical court." The argument of the plaintiffs, put shortly, is that the execution of a judgment is a " proceeding in a court of law " ; that under the Act such " proceeding " may be brought at any time within twelve years from the date on which the judgment became enforceable and that accordingly Or. 42, r. 23 (*a*), is ultra vires in so far as it cuts down the right of execution by subjecting it to the discretion of a judge, if not exercised within six years of the judgment. The matter is to some extent historical. By s. 40 of the Real Property Limitation Act, 1833, it was provided " that no action or suit or other proceeding shall be " brought to recover any sum of money secured by any " mortgage, judgment or lien, or otherwise charged upon or " payable out of any land or rent, at law or in equity, or any " legacy, but within twenty years next after a present right to " receive the same should have accrued to some person capable " of giving a discharge for or release of the same . . . ," subject to the qualification as to part payment thereinafter mentioned. The result of this provision was that a judgment became barred after twenty years (*Watson* v. *Birch* (1)). While

---

(1) (1847) 15 Sim. 523.

C. A.
1948
W. T. LAMB & SONS v. RIDER.

this Act was still in force the Common Law Procedure Act, 1852, was passed. Prior to the passing of this statute the law presumed a judgment to have been satisfied when a year and a day had elapsed without execution being issued upon it; and at common law the only remedy in such a case (in personal actions) was by an action of debt on the judgment, though by the Statute of Westminster 2, Chapter 45, a scire facias or warning could be issued on which, failing appearance or defence, execution might be obtained (see Day on the Common Law Procedure Acts, 4th ed., p. 148). The Act of 1852 relaxed this practice. By s. 128 it was provided that "during the "lives of the parties to a judgment, or those of them during "whose lives execution may at present issue within a year "and a day without a scire facias, and within six years from "the recovery of the judgment, execution may issue without "a revival of the judgment." Section 129 provided that "in cases where it shall become necessary to revive a judgment "by reason either of lapse of time, or of a change, by death or "otherwise, of the parties entitled or liable to execution, the "party alleging himself to be entitled to execution may "either sue out a writ of revivor . . . . or apply to the court "or a judge for leave to enter a suggestion upon the roll to the "effect that it manifestly appears to the court that such "party is entitled to have execution of the judgment and to "issue execution thereupon;" and (by s. 130) "upon such "application, in case it manifestly appears that the party "making the same is entitled to execution, the court or judge "shall allow the suggestion as aforesaid to be entered . . . . "and execution to issue thereupon; . . . . and in case it "does not manifestly so appear the court or judge shall "discharge the rule or dismiss the summons, ..." in which case the party making such application should be at liberty to proceed by writ of revivor or action upon the judgment. It is, perhaps, material to observe at this point that inasmuch as, by the Real Property Limitation Act, 1833, a successful plaintiff had twenty years within which to bring an action, suit or other proceeding to recover (inter alia) money secured by a judgment, an argument similar to that which was presented to us might very well have been urged at any time between 1833 and 1852 on the ground that the restrictions on the plaintiffs' right to execution were inconsistent with his rights as recognized by s. 40 of the Act of 1833. And, indeed, after 1852 a plaintiff might have argued that the enactors of the Common

Law Procedure Act could not have intended to have cut down such right by, as it were, a side wind. No case was brought to our attention in which any such arguments were advanced; nor, as we think, could they have been advanced with any prospect of success for the reasons hereinafter stated.

To continue the history of the matter, s. 40 of the Act of 1833 was re-enacted in substantially similar terms by s. 8 of the Real Property Limitation Act, 1874, with the substitution of twelve years for twenty; and in *Jay* v. *Johnstone* (1) it was held by the Court of Appeal that the expression "judgment" refers to judgments generally, and is not restricted to judgments which operate as charges upon land. The provisions of the Common Law Procedure Act, 1852, to which we have referred became, after the Judicature Acts, 1873–1875, the subject of Rules of the Supreme Court. Or. 42, r. 18 (now r. 22) provided, that as between the original parties to a judgment, execution might issue at any time within six years from the recovery of the judgment. The predecessor of the relevant part of the present r. 23 was r. 19 of Or. 42. That rule to some extent varied the practice which existed under the Common Law Procedure Act, 1852. It preserved alternative processes, according to whether the right of execution was or was not sufficiently clear to be enforced summarily, but it simplified the procedure by providing that, if the right was clear, the judge might order execution to issue whilst, if it was not, he could direct the question to be tried. Finally, the limitation of actions upon judgments is now dealt with by s. 2, sub-s. 4 (to which we have already referred) of the Limitation Act, 1939, which statute repealed the Real Property Limitation Acts of 1833 and 1874.

It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure—machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders. A refusal by the court, whether before or after the passing of the Common Law Procedure Act, 1852, to place this machinery at a plaintiff's disposal in no way affected his right to sue on the judgment at any time within the statutory limit of time—as indeed was expressly recognized by the proviso to

---

(1) [1893] 1 Q. B. 189.

s. 130 of that Act. Mr. Terrell, however, as we understood him, said that whatever may have been the position previously, a successful plaintiff is now entitled, by virtue of the Limitation Act, 1939, to issue execution at any time within twelve years of the judgment. He relied particularly on the definition of " action " in s. 31 of the Act and said that it is an extremely wide definition, and should be contrasted with such earlier definitions as that in s. 100 of the Judicature Act, 1873, and s. 225 of the Judicature Act, 1925. It is true that the definition of " action " in s. 31 of the Limitation Act is wide, but we are unable to see how this fact gets the plaintiffs within measurable distance of the conclusion which they seek to found on it. The reason for including " any proceeding in a court " of law " in the meaning of the word " action " is sufficiently apparent when one sees that many of the actions dealt with by the Act (e.g. foreclosure and redemption actions) are normally commenced by originating summons and not by writ. No more weight can be attached to this definition than could have been attached to s. 40 of the Act of 1833 in which the words " Action or suit or other proceeding " were prefatory to a number of different kinds of proceedings, some at common law, some in equity, and would require accordingly to be read distributively. The language of s. 2, sub-s. 4, in itself is plain and re-enacted existing law. To resort to the definition section, not otherwise required, in order to show that the legislature were intending to blend together matters respectively of substantive law and of procedure which have never been blended before is to adopt what is, to our mind, a bold but illegitimate course. The relevant provisions of the Real Property Limitation Acts, 1833 and 1874 and of the Limitation Act, 1939, dealt, in our opinion, with the substantive right to sue for and obtain a judgment, and with that alone. The Common Law Procedure Act, 1852, and Or. 42 of the Rules of the Supreme Court were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of " action " in the Limitation Act, 1939, the effect of merging the two together. We are satisfied that the plaintiffs' attack upon the validity of Or. 42, r. 23 (*a*) is without foundation and accordingly that he has no right to proceed to execution except with the leave of the court under that rule. As to the necessity for such leave, Mr. Terrell further argued

C. A.
1948
W. T. LAMB & SONS v. RIDER.

that even after the expiration of six years a plaintiff is entitled to execution as of right unless a change has taken place by death or otherwise in the parties entitled or liable to execution. In our judgment, however, the issue of execution is within the discretion of the court after six years have elapsed, even where no such change has occurred.

At the request of counsel for the plaintiffs, after we had reserved judgment, we consented to hear him and if necessary counsel for the defendant upon the bearing of the case of *Lougher* v. *Donovan* (1) reported after the hearing of this appeal. Having heard him, we do not think that decision relevant. There the plaintiff's right of action was upon an order of the court made in 1929 and the twelve years limit of the Limitation Act, 1939, had brought the original right of action on the order of 1929 to an end five years before the vain attempt of the plaintiff to resuscitate it was made in 1946.

The defendant's appeal must be allowed with costs here and below.

Defendant's appeal allowed.
Plaintiffs' appeal dismissed.

Solicitors for the plaintiffs: *A. M. Longhurst & Butler.*
Solicitors for the defendant: *Davenport, Lyons & Barker.*

(1) [1948] 2 All E. R. 13.

P. B. D.

1948
July 21.
Croom-Johnson J.

In re AN APPLICATION BY BECK AND POLLITZER AND OTHERS

AND

In re THE REQUISITIONED LAND AND WAR WORKS ACT, 1945.

Highway (for vehicles and foot passengers)—Stopped up under emergency powers—Order for permanently stopping up—Provision for L.C.C. to dedicate footway on site of highway stopped up—Provision for improvements to neighbouring highways—Nature of, and time for, not stated in order—Requisitioned Land and War Works Act, 1945 (8 & 9 *Geo.* 6, *c.* 43), *Part III., ss.* 15 *to* 22.

Acting under Part III. of the Requisitioned Land and War Works Act, 1945, the Minister of War Transport made an order that a highway (for vehicular traffic and foot passengers) in

1948

An Application by Beck and Pollitzer, *In re* and The Requisitioned Land and War Works Act, 1945, *In re.*

London, which had been stopped up in the exercise of emergency powers, should be permanently stopped up, but requiring as a substitute for that highway stopped up, the dedication of a new highway only for foot passengers by the London County Council (owners of adjoining property), which should pass along a part of the site of the stopped up highway. It was contended that since there was no provision in the Act of 1945 for stopping up part of a highway in breadth (such as that in s. 84 of the Highways Act, 1835, by which, on the stopping up of a highway, a foot or bridle-way could be reserved), the Minister's order was not within the powers of Part III. of the Act.

Held, that the order was not a stopping up of part of the highway and was within the powers of Part III. of the Act.

An objection to a draft order for stopping up a highway, made under Part III. of the Act of 1945 was referred to the War Works Commission (see s. 1 of the Act). Before the Commission, objectors submitted that what was proposed was not within the powers of the Minister under the statute. The Commission refused to entertain this submission and reported that the order could properly be made, subject to certain modifications, requiring as a substitute for the highway stopped up, the provision of a new highway for foot passengers only and the improvement of two neighbouring highways at their junction. The nature of the improvement, the time when the new highway was to be dedicated and the improvement to be made, were not specified. The Minister made an order under Part III. of the Act in accordance with the report of the Commission, as by virtue of sub-s. 4 of s. 18 of the Act, he was bound to do, but directed in the order that the London County Council should dedicate the new highway and make the improvement. On a motion under sub-s. 2 of s. 19 of the High Court to quash the order of the Minister on the ground that the order or a provision of it was not within the powers of Part III. of the Act or that the interests of the applicants had been substantially prejudiced by a requirement of Part III. not having been complied with:—

Held, that the court had no jurisdiction to consider whether the Minister was, under the terms of s. 15, sub-s. 1, of the Act, satisfied that, in the public interest, it was necessary or expedient to stop up the highway.

Held also, that the court had no power to consider whether the Commission was right in refusing to entertain the submission in law made before them, but that, if it had, following *Rex* v. *Hudson* [1915] 1 K. B. 133 and 838, the Commission was right in refusing to entertain the submission.

Held also, that the Minister's order was not " otherwise than " in accordance with the report of the Commission " since the provision in the order of the name of the authority to dedicate the new highway and make the improvement of the neighbouring highways was mere surplusage, and

Held also, that the order was within the Minister's powers, although the nature or manner of making this improvement was not specified and although the time when the new highway was to be dedicated and the improvement to the neighbouring highways made, was not specified. The Commission had not specified these details and, therefore, by reason of sub-s. 4 of s. 18 they could not be specified in the Minister's order.

MOTION to quash the Stopping up of Highways (London) (No. 1) Order, 1948, S.I. No. 42 of 1948, dated January 8, 1948, made under s. 19, sub-s. 2, of the Requisitioned Land and War Works Act, 1945. By that sub-section if any person aggrieved by any such order " desires to question the validity " thereof, or of any provision contained therein, on the ground " that it is not within the powers of this Part of this Act or " that any requirement of this Part of this Act has not been " complied with in relation to the order," he may make an application to the High Court and the court, if satisfied that the order in any provision of it is not within the powers of this Part of the Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Part of the Act, not having been complied with may quash the order or any provision contained therein either generally or in so far as it affects any property of the applicant.

A highway known as Belvedere Road running from Westminster Bridge Road along the back of the London County Hall as far as Chicheley Street was ordered during the late war to be stopped up under the powers contained in reg. 16 of the Defence of the Realm (General) Regulations, 1939. By s. 15 of the Requisitioned Land and War Works Act, 1945: " (1.) Subject to the provisions of this Part of this Act and in " particular to the provisions thereof relating to the publication " of proposals and reference thereof to the Commission " (The War Works Commission, see s. 1 of the Act) " where any " highway has been stopped up . . . . in the exercise of " emergency powers, the Minister of War Transport may, if " he is satisfied that in the public interest it is necessary or " expedient so to do, by order authorize the permanent " stopping up . . . . of the highway." And by sub-s. 2 an order under this section may provide (*a*) " for requiring, as " a substitute for any highway stopped up under the order, " the provision or improvement of another highway or other " highways." By sub-s. 3, an order under this section may contain " such consequential, incidental and supplemental " provisions as appear to the Minister to be necessary or " expedient for the purposes of the order, including provisions "authorizing the compulsory acquisition of land." Section 17 provides for the publication of a proposed order under s. 15 and by sub-s. 4: "If within the time limited by a notice under "this section the Minister receives any written objection to "the draft order, he shall unless he decides not to proceed "with his proposals, refer the draft order to the Commission" (see s. 1) "for a report and shall take no further proceedings "until the Commission have reported to him." By s. 18, sub-s. 4: "Save as aforesaid"—two cases specified in sub-s. 2, neither of which was here in question—"the Minister shall "not make any order otherwise than in accordance with the "report of the Commission."

Three persons considering themselves aggrieved by a draft order for the permanent stopping up of Belvedere Road which had been made on July 9, 1946, sent written objections to the Minister; the draft order was sent to the Commission who held a public inquiry on June 9 and 10, 1947. The Commission refused to consider points of law urged before them by objectors that what was proposed was not within the powers of the Minister.

The Commission reported to the Minister in November, 1947, that the order permanently stopping up this portion of Belvedere Road could properly be made subject to the following modifications: the order should provide for requiring as a substitute for Belvedere Road (*a*) the improvement of the highway known as York Road and Westminster Bridge Road at their junction; (*b*) the provision of a footpath of not less than thirteen feet and not more than twenty-one feet on the West side of Belvedere Road. Accordingly the Minister by his order of January 8, 1948, following the words of the draft order, stated that he was satisfied that in the public interest it was necessary or expedient to stop up Belvedere Road and ordered its permanent stopping up, but added what was not in the draft order the name of the authority, the London County Council, to dedicate the new highway and to improve the highway known as York Road and Westminster Bridge Road at their junction. The new highway was to be a "footpath of not less than "thirteen feet and not more than twenty-one feet in width "on the west side" of the highway described in Part I. of the schedule which the judge found to be Belvedere Road.

Gerald Thesiger K.C. and *H. J. Baxter* for the applicants:

The Commission's report and the Minister's order were not within the spirit and intention of Part III. of the Requisitioned Land and Works Act, 1945. The Commission refused to consider points of law urged before them by objectors to the draft order that what was proposed was not within the powers of the Minister. The Commission having refused to consider the points of law raised, they were wrong in reporting that the order could be made stopping up this highway and by s. 18, sub-s. 4, the Minister could not make an order otherwise than in accordance with the report of the Commission.

The Minister is given the power under Part III. of this Act to stop up a highway, that is the whole breadth of a highway; he has no power given to him to stop up a part of it. He must stop up the whole of it or none of it. Compare the provisions of ss. 84 and 85 of the Highways Act, 1835. By s. 84 there was power on the stopping up of a highway to reserve a bridleway or a footway; but there was no such power in the Act of 1945. See also *Rex* v. *Milverton* (*Inhabitants*) (1) and *Rex* v. *Winter* (2). The power in sub-s. 2, (*a*) of s. 15 is "for requiring "as a substitute for any highway stopped up under the order, "the provision or improvement of another highway or other "highways." The proposed footway to be dedicated by the London County Council is not a substitute for the stopped up highway, Belvedere Road. If you take away a man's three-piece suit and hand him back the waistcoat, this return is not a substitute for the suit, it is merely a part of the suit, the rest of which you have removed. Further, the inference to be drawn from the provision that a part of this highway shall continue as a highway (a provision not in the original draft order) is that the Minister was not "satisfied that in the public "interest it is necessary or expedient" to authorize the stopping up of this highway within the meaning of sub-s. 1 of s. 15 of the Act.

Those who are prejudiced by the stopping up of Belvedere Road have no information as to when the footpath, said to be a "substitute" for it, will be dedicated, what is the nature of the improvement to the neighbouring highways of Westminster Bridge Road and York Road at their junction, or when, whatever that improvement may be, it will be effected. They are without any remedy for securing these "substitutes." The order, as it was eventually made, was so different to the

---

(1) (1836) 5 Ad. and El. 841.

(2) (1828) 8 B. & C. 785.

1948

AN APPLICATION BY BECK AND POLLITZER, *In re* AND THE REQUISITIONED LAND AND WAR WORKS ACT, 1945, *In re.*

draft order published, that it cannot be said that the original order was ever duly published.

Sir Hartley Shawcross A.-G. and *H. L. Parker* for the Minister: The Commission was a lay tribunal and it is clear from the provisions of the Act that the determination of points of law were not within their jurisdiction: see *Rex* v. *Hudson* (1), the case cited by them in their report. By s. 15, sub-s. 1, the Minister could stop up this highway, if he was satisfied that in the public interest it was necessary or expedient so to do. This court cannot enter on the question of whether the Minister was so satisfied: *Liversidge* v. *Anderson* (2) and *Robinson* v. *The Minister of Town and Country Planning* (3). The order of the Minister to stop up this highway was within his powers and so was the provision that the London County Council should dedicate a new highway for foot passengers in substitution for it. It is conceded that the route of the new way passes over the route of the former highway which has been stopped up, but that this fact makes the Minister's order invalid is an affront to common sense. The order of the Minister follows, as it must, the report of the Commission that there should be a highway improvement at the junction of Westminster Bridge Road and York Road. The Minister's order adds the name of the authority to carry this out and also to dedicate the new footway; but this is mere machinery and surplusage. It would be unsafe and undesirable to put into what is a formal order the nature of the improvements to be made at this junction of highways. That is a matter far better left to the improvement authority.

Gerald Thesiger K.C. replied.

CROOM-JOHNSON J.: This is a motion to quash an order made by the Minister of War Transport under the Requisitioned Land and War Works Act, 1945, known as the Stopping up of Highways (London) (No. 1) Order, 1948, S.I. No. 42 of 1948 dated January 8, 1948.

It is important to observe that the powers of this court under sub-s. 2 of s. 19 of the Requisitioned Land and War Works Act, 1945, as I read them, are limited. The jurisdiction of the court is to quash the order on one of two grounds, or on both. One is that it is not within the powers of Part III. of the Act, and the other is that the interests of the applicant have been substantially prejudiced by any requirement of Part III. not having been complied with. Nothing else. It does not grant a general appeal to persons alleging that they are aggrieved by the making of the order and the court, as I read it, has nothing to do with the question whether it was wise or unwise to make the order. The machinery set up by the Act of 1945 seems to have been designed with care and attention.

---

(1) [1915] 1 K. B. 133 and 838.

(2) [1942] A. C. 206.

(3) [1947] K. B. 702.

[His Lordship having epitomized the sections in Part III. of the statute, said that he thought the principles on which the Commission were to act laid down in s. 11 of the Act were applicable to Part II. of the Act and not to Part III. He continued]: This legislation has produced the order of January 8, 1948, and the applicants—the persons aggrieved—have taken some eight grounds which are intended to show that the Minister exceeded his powers, or did not obey or carry out or observe the requirements of the statute, most of which have been supported by Mr. Thesiger. The first ground is that "The Minister was not satisfied that it was necessary "or expedient in the public interest to authorize the permanent "stopping up of the highway but only the exclusion of all the "public from part thereof and some classes of public users "from the remainder." The Minister has said in the order that he is satisfied that, in the public interest, it is expedient that what he calls "the old highway" should be permanently stopped up. He used the same words in the draft order which by s. 17, sub-s. 1, of the Act is one of the first steps to set this machinery in motion. It has long since been held that when a statute provides for a Minister being satisfied on a particular issue that there is no jurisdiction in the King's Bench Divisional Court to examine into the question, which is a question of fact, whether the Minister is satisfied or not, and I cannot see that this court has any jurisdiction under Part III. of the Act to say whether the Minister is satisfied that in the public interest it was necessary or expedient to stop up this highway. There may be cases in which, on the ground of want of bona fides, a court may have power to act. I do not know whether this court, operating under s. 19, sub-s. 2, has any jurisdiction to do anything of the kind, but, as I have said, the court will not go behind the expression of the Minister's satisfaction. I need not refer to or cite passages from the well-known authorities to which I have been referred in the course of the argument; both are well known—*Liversidge* v. *Anderson* (1) and *Robinson* v. *The Minister of Town and Country Planning* (2). I do not think that it is open to the aggrieved parties in this case to invite this court to interfere on their behalf on this ground.

The second part of that first ground deals with the suggestion that the Minister has only purported to stop up a part of the highway by this order. That brings me to ground 2: "The "order while purporting to provide for the substitution of "another highway for the highway to be stopped up does not "so provide but only leaves part of the existing highway "(which was a carriageway) available and only for the limited "use." The particular street which has been stopped up is Belvedere Road, or rather that part of it which runs between Westminster Bridge Road and Chicheley Street, and is depicted in pink on the plan. It appears that under the order the Minister purported to stop up the highway, not merely the pink part of it, but part of it which is at present hatched in blue on the plan—I suppose the footpath—and the highway, the vehicular part of the highway and possibly a little more. The suggestion is that it was reported by the Commission to the Minister that his original order, which provided only for the stopping up of the old highway could properly be made subject to certain modifications. I think it is convenient that I should read the operative part: "The Commission "having considered the evidence and the contentions (other "than the legal points mentioned) submitted on behalf of all "parties, report to the Minister that they are satisfied that "the order permanently stopping up the highway known as "Belvedere Road (between Westminster Bridge Road and "Chicheley Street) can properly be made subject to the "following modifications. (1.) That the order should provide "for requiring as a substitute for Belvedere Road, (*a*) the "improvement of the highways known as York Road and "Westminster Bridge Road at their junction; (*b*) the provision "of a footpath of not less than thirteen feet and not more than "twenty-one feet on the west side of Belvedere Road." Accordingly, when the Minister came to make the order, following, as he must do by virtue of sub-s. 4 of s. 18, the report of the Commission, he ordered the permanent stopping up of the old highway and he added something which was not in the report, that in substitution therefore the London County

---

(1) [1942] A. C. 206.

(2) [1947] K. B. 702.

Council should dedicate the new highway—I will show what that was in a moment—and should improve the highways known as York Road and Westminster Bridge Road at their junction. That seems to follow exactly the provision in s. 15, sub-s. 2 (*a*), with the exception that the London County Council are being ordered to dedicate the new highway. The new highway which is to be substituted appears in Part II. of the schedule : " A footpath of not less than thirteen feet and " not more than twenty-one feet in width on the west side of " the highway described in Part I. of the schedule, more " particularly delineated and hatched blue on the plan afore- " said." The highway to be stopped up is described as Belvedere Road and that, I think, means the whole of it. It is true that the schedule goes on to say " coloured red on the " plan," which gives an opening to the applicants to say that what they are really seeking to do is to shut up only part of the highway, but I think I must look at the operative part of the order which says that Belvedere Road is being shut up, and then in substitution for it provision is made not for part of Belvedere Road being left open, not for part of the highway not being shut up, but for the construction of a new highway, not for the same purpose because it looks as if it covers the pavement—thirteen feet and not more than twenty-one feet—and probably the gutter at least of the old highway. The new highway so constructed is to be dedicated by the London County Council and is to be in substitution for the old highway which is being wholly closed under this order. The objection which is made in ground (2.) is that the order is not an order for closing the highway at all, and accepting, as I do, the admission now made by the Attorney-General on behalf of the Minister of War Transport that the new highway when made will occupy a part of the site of the highway which has been closed under the order, I have to examine and see whether I can say that that amounts really to closing only one part of the highway. It is not what the order says. The argument of Mr. Thesiger is interesting and ingenious. It is said that there is no provision in this statute for closing a part of the highway, and Mr. Thesiger has cited two authorities : the first is *Rex* v. *Milverton* (*Inhabitants*) (1). That was a case in which the justices, being in a difficulty, made an order stopping up that part of the road which happened to be half the width of the whole highway, which was within their juris-

(1) 5 Ad. and El. 841.

diction and the Court of King's Bench decided that there is no power in the justices to do that. It was decided on examination of s. 2 of 55 Geo. 3 that there was no power to block up part of the highway and the court so held. The other case was that of *Rex* v. *Winter* (1) in which it looked as though the court would have come to the conclusion that where justices have power to divert a road for carriages and foot passengers they could not discriminate and say they would only shut it up for one purpose and not for the other. I do not see how either of these authorities—it being admitted that they are not compelling authorities—help; I think on the facts, that those cases are quite distinct. The Minister here has not purported to or intended to shut up only part of this highway. What he manifestly intended to do, and what the Commission by its report recommended that he should do, in effect, was this. Shut up the old highway and then we will make on part of the site so acquired—to be effected by the direction of the London County Council—a new highway limited for foot passengers only. That is the modification which the Commission recommended and that is what the Minister has done under sub-s. 2 of s. 15 in accordance with the report of the Commission. This point then fails. It is indeed at best only a very technical point, because it has been admitted that if the Minister had merely stopped up this highway by an order, the site of it would appear to have been vested in the London County Council, who are the owners of the adjoining property, and there would have been nothing to prevent the county council as a matter of law, if they were so disposed, the very next day after the order was made dedicating a part of the site so acquired by them as a foot passengers' way from Westminster Bridge to Chicheley Street. However, in the circumstances of this case I am quite satisfied that if this was what the Minister did, I cannot say he had no power to do it.

Then it was contended that since by the Minister's order the London County Council was to make the improvement at the junction of the two highways and indeed to dedicate the new footway this was a breach of s. 18, sub-s. 4, of the Act. by which the Minister is not to make any order otherwise than in accordance with the report of the Commission, because the Commission had not in terms reported that the London County Council were to carry out those duties. It has been contended that directly the Minister by his order goes beyond the actual words of the report, he is in breach of sub-s. 4 of s. 18. I do

(1) 8 B. & C. 785.

not think so. Power to make improvements in streets was conferred on the Board of Works under the Metropolis Management Acts, the lineal descendants of whom are the London County Council, who alone could make improvements in streets with the exception of the London Borough Councils in some cases, of which, so far as I can see, this is not one. When the Minister makes an order that an improvement shall be carried out, presumably it must be carried out by some authority. Does he then go beyond the authority of the Commission who recommend that an improvement shall be carried out if he adds the name of the authority who alone can carry it out? If the authority to effect the improvements and to dedicate the new highway had not been mentioned, the order would have been valid and, in my view, the requirement that the London County Council shall carry out the work is mere surplusage.

Then we come to the third ground. When the issue was before the War Works Commission those who appeared for the objectors made submissions to the Commission to the effect that what was being proposed in this case was ultra vires the powers of the statute and of the Minister under the statute. The Commission refused by their report to entertain those matters and they state that they have come to their determination, having considered the evidence and the contentions other than these legal points. What is contended is that since the Commission have not reported on these contentions and since they ought to have reported on these contentions, they have not carried out their function under s. 18. That being so, the requirements of the legislation not having been observed the Minister cannot make this order. But it is plain from the very circumscribed powers contained in sub-s. 2 of s. 19 that there is no jurisdiction in this court to enter upon this issue. I am not considering the conduct of the Commission. Further, I cannot see what jurisdiction the Commission had to pronounce in advance on the question of the Minister's powers, which, by sub-s. 2 of s. 19, if appears are expressly left for the determination of this court. I think that if the Commission had proceeded to embark on such an investigation they might very well have been prohibited, and if they had said in view of those contentions: "We will "not go on and do the work which is entrusted to us" they would have been subjected to an order for a mandamus to carry out their statutory duties under the statute. I should have arrived at that conclusion from my reading of Part III. of the Act of 1945, but very conveniently the Commission have set out in their report a decision under another statute which they say is of value in considering what were their duties. The case is *Rex* v. *Hudson* (1). A Commissioner, appointed under the National Insurance Act, 1911, to conduct an investigation which was to lead to the decision of the Board of Trade as to whether a particular order should, or should not, be made under the provisions of Part II. of the National Insurance Act, 1911, was induced to look into the question of the powers of the Board of Trade to make the order, and he decided that there were no powers in the Board of Trade to make the order, and on that ground he did not continue his inquiry, whereupon the Board of Trade applied to the King's Bench Division for a rule for a mandamus on the ground that he had no jurisdiction to decide whether the order was ultra vires—but only whether it was desirable. The rule was made absolute and the decision was upheld in the Court of Appeal. The analogy of that case leads me to re-affirm the view about the Commission's duties and powers which I have already expressed. In these circumstances, even if I had the power to consider what the Commission ought, or ought not to have done, and I do not think I have, I should have come to the conclusion that the Commission had acted rightly.

I can deal with the remaining grounds in a few words. The fourth ground was that the amendments that were suggested by the War Works Commission did not constitute "modifications" within the meaning of s. 18. I am not sure that I understand the contention. Mr. Thesiger, with great skill, has not argued it: though he did not abandon it, but left it to die of inanition. A modification is something which modifies, and the original draft order put forward to the Commission by the Minister proposed simpliciter to make an order closing Belvedere Road between Westminster Bridge Road and Chicheley Street. The Commission thought, and I agree with them, that they were proposing modifications. The fifth ground, it is now agreed has nothing to do with the case. The sixth alleged that inasmuch as the modifications were radical modifications—I am using my own language—in effect the order made was so different from the order originally proposed, that inasmuch as only the order originally proposed was published in accordance with s. 17, it is impossible to say that the new or revised or modified order has been so published. Having come to the conclusion that what is proposed was a mere modification under the powers reserved to the Commission and to the Minister I think this point also fails. Ground 7 dealt with the provision of the footpath and it seems to me to raise, if it raises anything, a question of fact, namely that a provision of a footpath provided in pursuance of the Minister's order, has the effect of not permanently stopping up the highway. Well, I think that has to be dealt with by looking at the language of the order which is clear, and by nothing else, and I think I have sufficiently covered that issue and I have inferentially dealt with the eighth ground by which it is contended that the Minister has not carried out his powers because he does not specify what improvement is to be made at the junction of the two neighbouring highways or say at what particular time or in what particular manner it is to be done or at what time the footpath is to be dedicated. If the Commission do so specify the Minister must, I think, have specified. Inasmuch as the Commission has not specified it seems to me there is no power in the Minister to specify. I do not think there is any necessity to specify those matters which, it is probable, will be better dealt with by the local government authority on whom these duties devolve. The application fails.

---

(1) [1915] 1 K. B. 133 and 838.

1948
AN APPLICATION BY BECK AND POLLITZER, *In re* AND THE REQUISITIONED LAND AND WAR WORKS ACT, 1945, *In re.*
Croom-Johnson J.

Motion dismissed.

Solicitors for the applicants: *Clifford-Turner & Co.*
Solicitor for the Minister: *The Treasury Solicitor.*

C. G. M.

Observations of LORD GODDARD, C.J., at p. 358, and DENNING, J., at p. 359, *disapproved.* ASHER *v.* SEAFORD COURT ESTATES, LTD. [1950] 1 All E.R. 1018.

Disapproved. ASHER *v.* SEAFORD COURT ESTATES [1950] A. C. 508

FIRST NATIONAL HOUSING TRUST, LIMITED *v.* CHESTERFIELD RURAL DISTRICT COUNCIL.

1948
July 26.
Lord Goddard C.J., Denning and Slade JJ.

Public health—Local government—Justices—Landlord and tenant—Dustbin—Supplied by landlord to tenant as a privilege, not under contractual or other liability—Notice by local authority requiring landlord, as owner, to supply dwelling-house with dustbin of certain dimensions and construction—Appeal to court of summary jurisdiction—Jurisdiction of justices—"Transfer to a tenant of any burden or "liability previously borne by the landlord"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s. 2, sub-s. 3—Public Health Act*, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 49), *s.* 75.

The landlord of a dwelling-house, subject to control under the Rent Restriction Acts, had provided and maintained a dustbin at the house for his tenant not by reason of any contractual term of the tenancy agreement, but as a privilege or benefit voluntarily conferred on the tenant. During and since the war dustbins became more expensive and not so lasting; but control of rents continued and the landlord had borne the whole expense of keeping the house in repair, at a time when the cost of such repair was very high. Acting under sub-s. 1, of s. 5 of the Public Health Act, 1936, a local authority which, as respects the district in which the house was situate, had undertaken the removal of house refuse served a notice on the landlord, the owner of the house, requiring him to provide for the house one covered dustbin for the reception of house refuse of a specified size, weight and construction. The owner, acting under sub-s. 1 of s. 75 appealed to a court of summary jurisdiction, which held that the requirement was unreasonable and allowed the appeal. On a case stated, it was contended for the local authority that, by their decision, the justices had decided that the obligation to provide the dustbin should be on the occupier, the tenant, and that this was the transfer to the tenant of a "burden or liability," previously borne by the landlord and, as such, prohibited by sub-s. 3 of s. 2 of Rent and Mortgage Interest (Restrictions) Act, 1920.

Held, that there was no transfer to the tenant of a "burden "or liability" previously borne by the landlord within the meaning of the sub-section since the justices had decided only that the requirement to provide a dustbin should not be made on the landlord; they had not decided that the requirement should be made on the tenant, since he was not a party to the proceedings before the justices, and the local authority, acting under sub-s. 3 of s. 75, might instead of requiring either owner or occupier to provide the dustbin, themselves provide it. Further the words "burden or liability" in the sub-section did not refer to a privilege, facility or benefit voluntarily conferred by the landlord on the tenant: they meant a burden or liability imposed by a term of the contract of tenancy or by a term imported by statute such as that contained in sub-s. 5 of s 2 of the Act of 1920.

CASE STATED by Derbyshire justices.

The First National Housing Trust, Ld., hereinafter known as the company by their secretary received three notices dated January 5, 1948, from the Chesterfield Rural District Council requiring the company pursuant to s. 75 of the Public Health Act, 1936 (1) within twenty-eight days of the service of the notices to provide one covered dustbin for the reception of house refuse for each of three dwelling-houses on the Frecheville Housing Estate near Sheffield of which the company were the owners. Each dustbin by the notice was to be of the following size and construction: "24″ x 16″, 28 lbs. weight, vertical "corrugated sides with tight-fitting conical cover and handles."

---

(1) Public Health Act, 1936, s. 75, sub-s. 1: "A local authority "who, as respects their district "or any part thereof, have under-

The company appealed to a court of summary jurisdiction as being a person aggrieved by a requirement of the local authority under the last paragraph of sub-s. 1 of s. 75 on the grounds: that (1.) the requirements were unreasonable and unfair; (2.) in making such requirements the council had failed to exercise its discretion in an equitable manner; (3.) the occupiers of the premises should have been required to provide the dustbins at their own expense; (4.) the rent paid by the occupiers of these premises to the company did not include any sum for the provision of dustbins; and (5.) that the company were aggrieved by the requirements.

Before the justices, it was proved that the company were the owners of the three dwelling-houses which were subject to control under the Rent and Mortgage Interest Restriction Acts, 1920 to 1939. When the three houses were erected in 1937 the company provided each of them with a dustbin and until June, 1947, it had been the regular practice of the company to replace the dustbins on their properties when they became worn out. In June, 1947, the company suggested to the

"taken the removal of home "refuse may by notice require the "owner or occupier of any building within the district, or, as "the case may be, within that "part of the district, to provide "such number of covered dustbins for the reception of house "refuse of such material, size and "construction as the authority "may approve . . . ."

"Any person aggrieved by a "requirement of the local authority under this sub-section "may appeal to a court of summary jurisdiction."

Sub-s. 3: "A local authority "may, as respects their district "or any part thereof, in lieu of "requiring the owners or occupiers of buildings to provide and "maintain dustbins for the reception of house refuse, undertake themselves to provide and "maintain such dustbins as may "be necessary and, so long as such "an undertaking is in force, the "authority may make in respect "of each dustbin provided by "them such annual charge not "exceeding two shillings and sixpence as they think proper."

"Any such charge shall become "due on the first day of April in "each year and may be recovered "as part of the general rate in "respect of the premises for which "the dustbin has been provided, "but without prejudice to the "rights of any person under any "tenancy agreement . . . ."

council that the dustbins should be replaced by the occupiers. The council did not accept this suggestion and between June, 1947, and January, 1948, the council served on the company ninety-eight notices requiring the provision of dustbins on this estate. Appeals by the company in the case of the first two notices having been dismissed, the company provided dustbins under all these notices. Between December, 1941, and April, 1947, owing to the difficulty experienced by the company in obtaining supplies of dustbins, the council by arrangement with the company provided two hundred and thirty dustbins for the estate which were paid for by the company.

From 1939 very substantial increases had taken place in the cost of maintenance and repair of the company's properties both in respect of labour and materials and no increase in rents had been possible in respect of those increases. The dustbins available were of shorter life and of higher cost than in 1939, the estimated cost of dustbins over the estate being in the region of 10*s.* per house per annum. The council had not at any time served a notice requiring the provision of a dustbin by the tenant of a house.

There was no formal tenancy agreement in the case of any of the houses. Each tenant was provided with a rent-book in the back of which were printed the conditions of the tenancy. Condition No. 12 was: "No wet refuse or vegetable matter "to be put in dustbin." The council had undertaken the removal of house refuse in the case of the three houses. The council's chief sanitary inspector had reported to their public health committee that new dustbins were required at the three houses. The committee resolved that the notices under s. 75 should be served on the company and their resolution was confirmed by the council.

Before the justices it was contended for the council inter alia that the provision and replacement of dustbins by the company was a term of the tenancy of each of the three houses. The justices expressed the opinion that, in all the circumstances, the orders of the council requiring the company to provide dustbins for the tenants was unreasonable, particularly having in mind the rent paid by the tenants (14*s.* 9*d.* in two cases and 14*s.* in the other) and the fact that the company had borne the whole of the expense of keeping the property in repair and at a time when the cost of such repairs was very high and that the company were unable to pass any part of such cost to the tenants; and furthermore that the council had not taken these matters into account prior to the making of the order requesting the company to provide three dustbins. Accordingly they allowed the appeals. The council appealed by way of case stated.

1948

FIRST NATIONAL HOUSING TRUST, LD. *v.* CHESTERFIELD RURAL DISTRICT COUNCIL.

F. Hallis for the Rural District Council. In effect, the justices have decided that the occupiers must bear the expense of replacing these dustbins, originally supplied by the landlords. I admit that there is no contractual liability on the landlords to provide or replace these dustbins. But, in fact, the landlords always have provided their tenants on this estate with dustbins. This burden they have taken on themselves and carried out. The three houses in question, as has been found in the case stated, were subject to the Rent Restriction Acts. By sub-s. 3 of s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: " Any transfer to a tenant of " any burden or liability previously borne by the landlord " shall, for the purposes of this Act, be treated as an alteration " of rent, and where, as the result of such a transfer, the terms " on which a dwelling-house is held are on the whole less " favourable to the tenant than the previous terms, the rent " shall be deemed to be increased, whether or not the sum " periodically payable by way of rent is increased . . . ." But an increase of rent, except within the permitted increases, is prohibited by the Rent Restriction Acts. This decision of the justices, therefore, contravenes the statute, since although this may not be the transfer of a liability it is certainly the transfer of a burden previously borne here by the landlords to the tenant: see *W. H. Brakspear & Sons, Ld.* v. *Barton* (1). This point was not raised in *Croydon Corporation* v. *Thomas* (2). The justices have taken the view that they can place the burden of providing these dustbins, previously borne by the landlords, on the tenant and this by virtue of the statute they cannot do.

[LORD GODDARD C.J. You say that a man can bear a burden, even if he can rid himself of that burden at any moment.]

Yes: The burden here is something which necessarily has to be borne by someone, according to the law and in the interests of public health, and the landlords have taken that burden on themselves. The justices in deciding the equities in the matter, have misdirected themselves in law.

(1) [1924] 2 K. B. 88.

(2) [1947] K. B. 386.

Crispin for the company was not called on.

LORD GODDARD C.J. Mr. Hallis in his clear and forcible argument has contended that as the justices have allowed the owners' appeal, they have in effect decided that the obligation is on the occupiers. He also contends that they have no jurisdiction to do so by reason of sub-s. 3 of s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1) which prohibits the transfer to a tenant of any burden or liability previously borne by the landlord. The facts as found by the justices show that this was a comparatively new housing estate, and when the houses were first let there was provided in each house by the owners what is commonly called a sanitary dustbin. Whether it was of the make or dimensions of the character specified in the notice served on this company, the owners, under s. 75 of the Public Health Act, 1936, does not appear. From time to time the owners have renewed these dustbins which are mere chattels, and it has not been contended that they were under a contractual obligation to supply a dustbin or, still less, to supply any particular make of dustbin. Had they been under any contractual obligation merely to supply some receptacle as a dustbin, it seems to me it would be left to the landlord to decide what sort of receptacle he would provide; he might provide a wooden box. Certainly there would be no obligation on him to provide a galvanized iron dustbin or any particular sized dustbin. But it was conceded in this case that the owners were not under any contractual obligation to provide a dustbin, and this court in *Croydon Corporation* v. *Thomas* (2), said: "One thing "which seems to be clear in this case is that the section "does not purport in any way to vary the terms of the contract "of tenancy or the lease between the landlord and tenant." Therefore, if the effect of what the local authority, which has undertaken the removal of house refuse, has done or the effect of what the justices do either in upholding or dismissing

---

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3: "Any transfer "to a tenant of any burden or "liability previously borne by the "landlord shall, for the purposes "of this Act, be treated as an "alteration of rent, and where, "as the result of such a transfer, "the terms on which a dwelling-"house is held are on the whole "less favourable to the tenant "than the previous terms, the rent "shall be deemed to be increased, "whether or not the sum periodi"cally payable by way of rent is "increased . . . ."

(2) [1947] K. B. 386, 390.

1948

First National Housing Trust, Ld. v. Chesterfield Rural District Council.

Lord Goddard C.J.

an appeal is to put on the tenant a burden, obligation or liability which by the terms of the contract ought to be discharged by the owners, the landlords, I should think that the tenant would have an action against the landlord to recover any expense to which he was put.

But that is not, in my opinion, the case we have to decide which is whether the justices were in any way limited in their discretion or whether they came to a wrong determination in point of law—because in this form of appeal we can only deal with a point of law—in coming to the conclusion that the owners, the landlords, were aggrieved by this notice. I pause to say that by deciding in favour of the landlords in this case it is not the fact that the justices have decided that these three tenants are to bear the expense; they have simply decided that the landlords are not to bear the expense. It may be that the practical result will be that the local authority may consider that, as the landlords have not to provide the dustbins the tenants must, or it may be the local authority will decide that they will do it themselves. Then there will come the question whether, if they do it themselves and recover the 2*s*. 6*d*. a year for having done it, landlord or tenant will have to pay. By sub-s. 3 of s. 75 the charge may be recovered as part of the general rate in respect of the premises for which the dustbin has been provided, but without prejudice to the rights of any person under any tenancy agreement. Such a case may come before us hereafter. In *Croydon Corporation* v. *Thomas* (1) this court emphasized that in giving the right of appeal from the local authority to the justices, the section expressly provides that a person aggrieved, that is to say, a person who is ordered to do something, had a right of appeal, and the court of summary jurisdiction to which he appealed could allow the appeal if they thought fit, provided they acted judicially. I cannot see any ground here for saying that they did not act judicially, unless the contention of Mr. Hallis is right that they have impliedly disregarded sub-s. 3 of s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which prohibits the transfer of a burden or liability from the landlord to the tenant except on the terms there mentioned. [His lordship read the sub-section.]

In the first place, the mere fact that the landlord originally did provide a sanitary dustbin and has, when necessary replaced, it, does not seem to me to be a burden or liability on him.

(1) [1947] K. B. 386, 390.

1948

FIRST NATIONAL HOUSING TRUST, LD. *v.* CHESTERFIELD RURAL DISTRICT COUNCIL.

Lord Goddard C.J.

Whether there is any distinction to be drawn between the words " burden " and " liability," whether the word " burden " is put in ex abundanti cautela, or is merely tautologous, I do not think I need inquire. I merely say I do not understand how a burden can be transferred with the result that " the " terms on which a dwelling-house is held are on the whole " less favourable to the tenant than the previous terms," unless the burden is a contractual burden. But it was admitted that there was no contractual burden or liability on the landlord in this case, so that I cannot see that there has been any transfer of a burden from the landlords to the tenant by reason of what the justices have done. Moreover, just as the justices have no power, so the local authority has no power, to vary the terms of the tenancy. If in fact what the justices do varies the terms of a tenancy, that it seems to me is a matter which might be discussed in an action. Applying the principles which were laid down in *Croydon Corporation* v. *Thomas* (1) since it does not appear to me that the justices have taken into account anything they ought not to have taken into account, but have applied their minds to the question whether the obligation was one which ought fairly to fall on these landlords, we are bound to dismiss this appeal. In my opinion, they have acted strictly within their jurisdiction in coming to this conclusion. Whether we should have come to that conclusion on the same evidence is not a matter with which we are concerned. I can find no fault in point of law with their decision, but I repeat that the mere fact they have decided in favour of the landlords in this case does not mean that they have put the burden on the tenants. In fact, they have no power to do so. It might well have been if the point had been present to the minds of the draftsmen or of Parliament, that in cases of this description where there may be a liability thrown on the landlord or the tenant provision would have been made for both parties to be brought before the court. There is no such provision in the Act, and there is no provision by which these tenants could have been brought before the court in this case. The only parties to the appeal, by the provisions of the Act are the owners or the occupiers, as the case may be, according to whichever is served with the notice, and the local authority. The justices must come to the fairest decision they can on the material before them as between those two parties. In my opinion, their decision was right, and this appeal must be dismissed.

---

(1) [1947] K. B. 386.

Denning J.: I agree. In my opinion the words "burden or liability" in sub-s. 2 of s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, refer to a burden or liability imposed by a term of the contract between landlord and tenant or by a term imported by statute such as that contained in sub-s. 5 of the same section. They do not refer at all to, or affect the landlord's power to discontinue, a privilege, facility or benefit which the tenant has previously enjoyed, so long as it is not a part of the terms on which the tenant holds the premises. I agree that the appeal must be dismissed.

Slade J.: I agree.

Appeal dismissed.

Solicitors for the council: *Lewin, Gregory, Torr, Durnford & Co., for Jones and Middleton, Chesterfield.*

Solicitors for the company: *Gregory, Rowcliffe & Co., for Neal, Scorah, Siddons & Co., Sheffield.*

C. G. M.

PEARSON v. COLEMAN BROTHERS.

C. A.

1948
June 17, 18, 21, 22.

Lord Greene M.R., Wrottesley and Evershed L.JJ.

Accident — Personal injury — Child at circus — Lavatory not provided —Reasonable search by child for secluded place to relieve herself— Injury by lion—Child an invitee—Liability of circus proprietors.

The plaintiff was a girl of seven years old and she went with her sister of twelve years old, each paying 1s., to a circus being held in a field. The defendants were the proprietors of the travelling circus and menagerie and the menagerie was kept in what was called a zoo lager alongside the circus tent. During the performance the plaintiff felt the need to relieve herself and, in the absence of a lavatory, got out of the tent and went in search of a secluded spot, following round the outside of the tenant and perhaps the zoo lager until she came to the point where a fenced runway led down from the lions' cage into the circus. Seeing in this an attractive spot for her purpose the child went to crawl under the runway but in doing so came so near the lions' cage that the lion was able to reach out a paw and maul her. In a claim by the plaintiff for damages,

Held by the Court of Appeal (reversing the decision of the county court judge) that as the plaintiff was an invitee to the circus and wandered about not out of curiosity but in a reasonable way in search of a secluded spot to relieve herself, she must be taken to have reached the spot where she was injured pursuant to the original invitation to the circus. It was impossible to say on the facts found by the county court judge that the zoo lager had been sufficiently marked off to show the child that it was a prohibited area. The defendants were therefore liable for damages, as keepers of a dangerous beast, for a breach of the duty to the plaintiff to keep the beast so confined as to be incapable of injuring her.

Robert Addie & Sons (Collieries), Ld. v. *Dumbreck* [1929] A. C. 358 distinguished.

APPEAL from Clacton-on-Sea county court.

The facts of this case are stated very briefly as they and the effect of the evidence are fully stated by LORD GREENE M.R. in his judgment.

On June 28, 1947, a little girl of seven years old went with her sister of twelve years old to a circus being held in a field at Clacton-on-Sea, each of them paying 1*s.* to go in. The defendants were the proprietors of the travelling circus and menagerie and the animals in the cages were kept in what was called the zoo lager alongside the circus tent. No lavatory was provided and during the performance the child got out of the circus tent in search of a secluded spot to relieve herself. In wandering round the outside of the tent the child came to a fenced runway leading down from the lion's cage into the circus ring and sought to go under it. In doing so she got within reach of the lion, who put a paw out through the bars of the cage and mauled her. The child by her next friend brought proceedings in the county court against the defendants for damages. The defendants did not appear at the hearing so that no evidence was given on their behalf. The deputy county court judge dismissed the action on the ground that the child when injured was at a spot where she was not entitled to be and was therefore a trespasser and not entitled to recover damages. In case his decision was wrong he assessed the damages at 75*l.* The child appealed.

Martin Jukes and *Caulfield* for the plaintiff. The lion was a dangerous animal on the defendants' land and all the plaintiff has to show is that it injured her, whether or not at the time she was a trespasser: *May* v. *Burdett* (1). The owner of any dangerous animal has to prevent it from causing injury:

(1) (1846) 9 Q. B. 101.

Salmond on Torts 10th ed. p. 545. In any case it was for the defendants to prove that she was a trespasser, and this they failed to do.

[LORD GREENE M.R. Surely it was open to the county court judge to find on the evidence before him whether the child was a trespasser ?]

The child was in fact an implied invitee or licensee. She was an invitee to the circus and in view of the fact that the defendants had failed to provide a lavatory and that many young children were being admitted without adults they ought to have anticipated what in fact happened in the case of this child. There was a presumption that a little girl might during the performance wish to relieve herself and what then was she to do ? A delicate-minded child would certainly look for some sheltered spot just as this child did. She must be taken to have acted reasonably and therefore to be licensed to do as she did : *Gould* v. *McAuliffe* (1).

[WROTTESLEY L.J. Because the child acted reasonably it does not follow that she was an invitee to the spot when the accident happened.]

She was at any rate an implied licensee, and the county court judge was wrong in holding that the plaintiff was a trespasser. Having paid for admission she was an invitee in the circus and it is suggested the zoo also. Not much help in these circumstances is to be derived from the "allurement" cases. At the least she was an implied licensee : the proprietors of a circus to which children are encouraged to go must be aware that some of those children are likely to need a lavatory. In its absence it is to be expected that children will go in search of a private and secluded spot in which they may relieve themselves : and in wandering for that purpose into what may well have seemed to her an ideal place for her purpose, the plaintiff did not become a trespasser ; she was doing what the proprietors ought to have expected, and must be taken to have licensed.

Rees Davies and *John Stevenson* for the defendants.

The county court judge, even without any evidence from the defendants, found in their favour, and there was evidence to support that finding. A person attending a public performance for payment is an invitee only in those parts of the premises set apart for the use of the public : if without the permission of the owners, a child strays into parts which are

---

(1) [1941] 2 All E. R. 527.

C. A.
1948

PEARSON
v.
COLEMAN
BROTHERS.

prohibited areas, he is a trespasser, and it is immaterial from what motive he trespasses—whether it be mere childish curiosity or disobedience, or, as here, in search of some place which might serve as a lavatory.

[LORD GREENE M.R. On the question of implied licence, what alternative could the plaintiff have adopted ?]

She could have asked her elder sister, or applied to an attendant to show her where she could go.

[LORD GREENE M.R. There is no evidence that any attendant was anywhere near.]

The following cases were cited: *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (1); *Walder* v. *Hammersmith Borough Council* (2) and *Liddle* v. *Yorkshire (North Riding) County Council* (3). The county court judge referred himself to the right question of law: *Glasgow Corporation* v. *Taylor* (4) a case that went so far as any could to assist a child. There a child who had a right to be where he was ate poisoned berries. That case differs from the present one by reason of the child then being in a public place. The question here is whether the child was a trespasser when injured. She could not have been invited to go within reach of the lion's cage. The *Glasgow Corporation* case (4) is material on the question of allurement. Cases were cited to the county court judge on the view that it is sufficient to prove injury by an animal feræ naturæ but *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (1) shows that the further question arises whether the child was at the place when she was injured as a licensee or a trespasser. It is permission to be there that must be proved and not merely tolerance. On the facts of the present case there was no invitation, expressed or implied. Whichever of the two ways of approach indicated by the county court judge were used by the child, she must have become a trespasser by the time she arrived at the point where she was injured. He referred to *Adams* v. *Naylor* (5).

[WROTTESLEY L.J. That was a totally different case, for the child there came from the highway. Here you must start from the fact that the child was an invitee to the circus.]

There was no duty on the defendants to provide a lavatory.

[WROTTESLEY L.J. I had thought that, but then the child must find somewhere to go.]

---

(1) [1929] A. C. 358.
(2) [1944] 1 All E. R. 490.
(3) [1932] 2 K. B. 102, 110.
(4) [1922] 1 A. C. 44.
(5) [1944] K. B. 750, 761.

Can it be said that the defendants might have expected the child to go where she did? They cannot have impliedly permitted it. Any boy or girl would know that a lion is dangerous and moreover there was a notice "Lions, danger."

Finally, it was for the plaintiff to prove her case and the accident was at a point where no reasonable person would provide protection. There is a sharp distinction between the present case and *Gould* v. *McAuliffe* (1). In that case there was a duty to provide a convenience and no warning was given that the dog was dangerous. Here the child should have gone to an attendant, and besides she was with her sister of twelve who would be expected to look after her.

[EVERSHED L.J. If I keep a dangerous animal and invite people to come on to the field, ought I not to do everything reasonable to protect them?]

It was impossible to anticipate that the plaintiff would go where she did, and all proper protection from the lion had been provided.

Lastly, if this case had gone against the defendants in the court below, they would certainly have applied for a new trial at which important new evidence could have been given by them. As it was, they could not do that, and they now ask this court to grant a new trial.

[EVERSHED L.J. Would you submit to pay costs in both courts?]

Yes.

LORD GREENE M.R. This is a most unusual case and it is important, for its correct decision, to scrutinize very carefully the facts, because there is here a combination of facts which, in my opinion, together lead inevitably to a certain legal conclusion. The result might be different if some of those facts were missing.

The infant plaintiff, being then of the age of seven years, went with her elder sister, aged twelve, to visit a travelling circus owned by the defendants, Coleman Brothers, the trade name in which the proprietors, a Major and Mrs. Fawset, carry on business as circus proprietors. The circus was at Clacton-on-Sea in the month of June of last year. The plaintiff was mauled by a lion belonging to the circus proprietors and her claim in the action against them was for damages. I shall refer to the circumstances in which she came to be mauled by the lion at some length in a moment.

(1) [1941] 2 All E. R. 527.

The summons was issued and served on August 23 personally on the proprietors of the circus, they, having in the meanwhile been on tour, returning to Clacton in that month. The action was heard at the Clacton county court before the deputy county court judge on September 23. That date had been given as the date for hearing in the summons served on August 23. From beginning to end the defendants have shown a masterly inactivity in relation to this litigation. They never answered the original letter before action; they instructed no solicitors; they put in no defence, and they did not appear at the trial. There was a difficulty in serving them with the notice of appeal, but eventually, after they had failed to acknowledge receipt of a copy sent to them by registered post, service was effected after application had been made to this court. No proposals were made by the defendants on receipt of the notice of appeal. That is all the more significant when I come to the point up to which I am leading. It is in the nature of a preliminary point, and that is why I want to get it out of the way. It was argued before us that the proper course for this court to adopt would be to order a new trial, because in the absence of the defendants at the trial the county court judge was not in a position to ascertain the true facts of the case; and at a late hour in the argument an offer was made that if a new trial was ordered the defendants would pay the costs of the plaintiff here and below. It is significant that no such offer was made in the first instance. If on receipt of the notice of appeal an offer of that kind had been made, and if at the hearing of the appeal an affidavit had been produced setting out the facts which showed that justice could not be done without a retrial, the situation might have been different; but it seems to me that from beginning to end of this case the defendants have really flouted the jurisdiction of the court. They have not taken the slightest trouble to defend themselves, due, we are now told, merely to forgetfulness, and they now wish, a year after the accident, to put the plaintiff to the further expense and risk of a new trial, when witnesses may very likely be unavailable. In a circus of this kind there may very well have been changes in personnel. To order a new trial now would be to inflict great injustice on the infant plaintiff; and, in my opinion, the facts which emerged at the trial are quite sufficient to enable this court to deal with the matter satisfactorily. The suggestion that some of the evidence which was before the judge could have been disputed by the defendants if they had been there does not impress me in the least. They had every opportunity to dispute it but they did not do so for the reasons I have mentioned, and I think it would be a thoroughly unsatisfactory precedent to give the defendants who have, with their eyes open, put themselves in such a position a chance to produce evidence at this date relating to facts which took place so long ago. From beginning to end the plaintiff, through her advisers, has behaved with perfect propriety in attempting to bring the litigation to the attention of the defendants, who simply ignored everything that was done.

Having got that preliminary point out of the way, it is necessary to deal with the substance of the case. I have said that the circus was located at the time at Clacton-on-Sea, and it was laid out in an open field. The only evidence we have of the lay-out of the defendants' circus and the accompanying zoo is to be found in a sketch plan put in evidence by the father of the little girl. That plan was accepted by the county court judge as being substantially correct. It is evidently drawn with great care and great attention to the relevant details, but it suffers from two defects; it has no scale upon it and it has no north point. For convenience I shall treat the top of the plan as being north and the bottom as being south, although that may be diametrically opposite to the facts. The lack of scale creates a little more difficulty but, fortunately, we have a photograph of the crucial point in the lay-out which gives a very good impression of what the scale ought to be, at any rate at that point. Examination of the plan shows that there was an entrance gate to the field in which the circus tent was pitched and the zoo laid out. From that entrance gate there was a way, whether it was hedged, or fenced, or roped, or open I do not know, but it is marked by two parallel lines leading to the entrance of the circus tent. The entrance money was not taken at the gate but at the entrance to the circus tent. Each of these little girls was in possession of 1s., which they paid at the entrance to the circus. The circus proprietors, not unnaturally, did not insist upon small children being accompanied by adults. I can understand that the admission of small children without adults would be a perfectly proper thing. The exact size of the circus tent is not clear, but some small idea of this can, perhaps, be obtained from the photograph. I now come to the zoo. What was called the zoo was an enclosure of a rough and ready kind made up of a sort of lager in which the wagons belonging to the show were put round and the intervals between them filled by canvas strips. On the south side of the zoo enclosure there is a more or less continuous barrier of a rough and ready kind formed by canvas strips, caravans and wagons put close together and a runged fence. That runged fence will come into the picture again presently. The north side of the zoo enclosure, which appears to be called the Pony Enclosure, is backed with canvas and, most important of all, a large lions' cage faced with bars and protected, at any rate as to part of it, by a rope on posts designed to keep the public at some distance from the actual bars of the cage. There is one matter about the zoo enclosure which I have not so far mentioned. The plan shows a definite entrance to the enclosure, it also shows that access to the enclosure is possible by persons agile enough to crawl under the canvas or to crawl under the caravans and wagons. Nevertheless, it is quite clear from this plan that there is a proper licensed entrance to the zoo, and that any person who got into the zoo by crawling underneath the canvas or the caravans would be doing something that was not authorized by the proprietors. The lions' cage was carried on, or possibly built on to the chassis of, a lorry, and the photograph shows that it had a door (apparently made of wood) on what, according to my assumption, was the east side of the cage, on which was written in large letters "Lions, danger." I shall have something to say about that inscription later. The lorry on which the lions' cage stood was parked quite close to the circus tent, the object being to enable the lions to be brought from the cage into the arena of the circus when they were going to be on show. For this purpose what has been called a runway was provided leading from an opening in the den itself down an inclined plane into the circus tent. This runway was protected by a system of bars, and it appears, according to the photograph, to have been inclined at an angle of something like twenty degrees. The photograph shows quite clearly that there is at one end of it a considerable space underneath. Some idea of the height of that space can be obtained from the fact that the eastern end of the runway was leaning upon the top of the chassis of the lorry. From that point the runway sloped down, in quite a short length of space, to the ground level, where it joined the circus tent.

Some questions arose in the hearing before us as to the exact area under the control and management of the circus proprietors in connexion with this circus and zoo. It was suggested that control did not extend to the whole of the open field in which the circus and the zoo were pitched. That point was mentioned by the learned deputy judge in his judgment, where he said: "there was no evidence that the "defendants had any control beyond the confines of their "show." That, of course, leaves open what the judge held the confines to be. The phrase is a quite vague one, as is made clear by the photograph. The circus tent itself was held in position by a number of guy ropes fastened to pegs in the ground a very considerable distance away from the tent, leaving ample passage for anyone to walk underneath them. The whole of the area covered by these ropes must have been under the defendants' control. The photograph also shows a lorry parked outside the lions' cage and close to the circus tent, obviously within the area of control of the defendants. It appears to me, therefore, and this is material in my view of the argument, that a person walking round the tent within an area covered by the guy ropes was within the area which was controlled by the circus proprietors. I interpret the finding of the learned county court judge, when he used the phrase "the confines of their show," as intended to include the area surrounding the zoo and the tent which it was necessary for the proprietors to control in order effectively to set up their show.

The little girl gave evidence at the trial and it is obvious that the deputy county court judge did his very best to ascertain the facts of the case. The little girl was obviously not able to give evidence in great detail, and she could not explain how it was that this particular accident happened. It did emerge, however, and the judge found, that the actual place where the lion clawed the little girl was close to the point where the runway left the lions' cage. There was no question of the little girl getting into the cage. The accident happened because there was a space between the bars of the lions' cage, or underneath the row of bars, through which the lions could put their paws and so be able to claw anyone within reach. It is said, and I am prepared to believe it, that in the ordinary way the rope surround would be sufficient to keep the public from the risk of danger through any such action by the lions. That may very well be, but the point that is perfectly clear is that this little girl, at the point where the lion struck her, had not the benefit of any adequate protection against the action of the lions, who were quite able to reach out with their paws and scratch her. The little girl's father also gave evidence, and, no doubt she had told the father material things which might not be ascertainable at the trial. But the judge, who had before him the father's plan, may very well have obtained from the father a few details, and there is one detail in particular which is very important. The father, of course, was called by the plaintiff, and he said something which, in my opinion, is sufficient to answer one argument which the plaintiff's counsel has put before us. It is perfectly clear from what he said that the little girl crawled, or tried to crawl, under the runway. He said : " I produce photograph showing " passage for the lions "—that is the runway—" under which " the plaintiff crawled," and that has not been contested before us. We must take it that the little girl obtained access to that point near the lions' cage where she was mauled not by the regular entrance to the zoo enclosure, but by crawling to that point through some other orifice. That matter is important in view of a suggestion that she may have entered the zoo by the authorized entrance. Now I come to another and, in my opinion, most important circumstance in this case. The little girl, in obtaining access to the point where she was injured, was not merely wandering about or actuated by curiosity. Whilst sitting watching the circus she had a need to relieve herself, and in order to do so she somehow got out of the circus tent, very likely by crawling under the canvas body of the tent. The zoo was laid out to the west of the circus tent. I have mentioned the runway leading from the lions' cage and the piece of fence which, together with the wagons and the canvas strips, formed one side of the zoo enclosure. That piece of fence was at the runway end of the enclosure, and it was a runged fence, though at one point next to the runway the rungs had disappeared. The facts as found by the judge on the question of how the little girl got there are as follows : " During the " show she desired to relieve herself and left her place to seek " a quiet corner to which she could retire. Apparently, she " got out of the circus tent through the canvas at the back " of her seat. At any rate, in the course of her search she " appears to have followed round the circus tent and the zoo " lager till she came to a fence which extended up to the " runway." That hypothesis, which the judge accepts as the probable one, means that she passed round the north of the circus tent, round the north and south side of the zoo enclosure, and approached the runway by means of the runged fence, which I have mentioned. The second possible view which he states is: "It may be that she did not in fact "complete the whole outer circuit of the zoo lager, but that "she approached the runway from the other side, from the "back of the lions' cage." That would mean that she came in on the north side of the runway, not on the south side as she would have done if she had approached through the runged fence. That the judge appears to regard as the less probable of the two views. The judge then goes on to refer to the fact that on the end of the lions' cage "Lions, danger" was painted in conspicuous lettering. "The difference of approach," says the judge, "appears to me immaterial, as in either case she "came to the runway through some sort of fencing from one "side or the other and attempted to crawl under it." I find the judge's reference to some sort of fencing on the north side of the runway difficult to follow, because there is no suggestion of it in the evidence, on the plan, or in the photograph. The only fencing which appears, so far as the evidence is concerned, is the runged fence which leads up to the runway in the south more or less at right-angles. "As she was passing "under the runway the caged lion put out his paw from the "cage front at the side of which the plaintiff was attempting "to pass, and she received the injuries for which she is "claiming damages." It is quite clear, therefore, that she was mauled by the lion at a point which is really the south-eastern corner of the cage, as shown on the plan, and she was mauled either when she was trying to get under the runway from the south or, if she got in from the north, just after she had passed under the runway—the learned judge says it matters not which it was. Before I read any further, I want to say something about the notice on the lions' cage, because a good deal of argument was based on it. It is quite clear that if the hypothesis as to the line of approach which the learned judge preferred was the right one, the little girl would not have seen that notice. But even if she approached not from the south but from the north and had seen the notice high up above her head and been able to read it, it is perfectly clear from the photograph that the notice was intended, and intended only, as a warning to persons who might be minded to open the doors that they would find a lion or lions inside.

C. A.
1948

PEARSON
v.
COLEMAN
BROTHERS.

Lord Greene
M.R.

It was not intended as a warning that lions were in there who might get their paws through the bars of their cage and injure people. If anyone imprudently opened the doors, not knowing what was inside, he might, of course, have suffered a much worse fate than the plaintiff did, and it was clearly for that reason that the notice was put on the door. I therefore attach no importance to that notice. In order to read it as a warning to herself, the little girl, assuming that she could read it, must have interpreted it as indicating that anywhere near that cage she would be in danger and that there were lions there who could get their paws through what to a child would have seemed to be an adequate barrier. Further it would have meant that she must form a just estimate of the reach of the lion's paw and the extent to which she would be in danger if she passed near it. The notice was not put up to warn people of any such danger, and, in my opinion, it could not have been so interpreted by the little girl, even assuming that she had read it.

I think I have mentioned all the necessary facts except one. There is nowhere any suggestion in the little girl's evidence, or on the plan, or in the findings of the learned judge, that the proprietors of the circus had provided any lavatory accommodation for their patrons. It was suggested before us, by Mr. Rees-Davies, that if a new trial were ordered his clients might be able to show that there was lavatory accommodation. If there was, then the plan is inaccurate and the judge's finding on it is inaccurate. The little girl says she looked for a lavatory and could not find one. It is perfectly true the judge does not, in terms, find there was not a lavatory, but the fact that there was no lavatory available for the little girl to go to is implicit, it seems to me, in the whole of his judgment, because he mentions her itinerary in her search for a convenient private place, and had there been a lavatory provided it would, very likely, have afforded a short answer to the whole case. I cannot think that the fact that he does not mention the absence of the lavatory really affects the plaintiff's case. I propose to deal with it on the footing, on which the judge was obviously dealing with it, that there was no lavatory.

The arguments put before us by counsel for the plaintiff were three. First, it was said that this is a case of a dangerous animal, which mauled the plaintiff, and that this is sufficient to throw on the defendants the burden of proving that they are not liable for that injury; and that, if in fact the plaintiff was a trespasser, it was for the defendants to prove it. That argument, in my opinion, does not succeed on the facts of this case, because here we have sufficient evidence to enable it to be determined whether the plaintiff was or was not a trespasser at the point where she was injured. The judge held that she was, and if the true conclusion is that she was a trespasser, the question of onus of proof appears to me to be quite irrelevant. If facts established by the plaintiff herself show her to be a trespasser, then the obligations of the defendants must be treated on that footing, and it is impossible to put on them a greater obligation than the law imposes with regard to trespassers on their land. That argument appears to me to fail for that reason.

The next argument was of this nature. It was said: "This "little girl was in the zoo enclosure, and, no matter how she "got there, she was entitled to be there, because it was a place "to which the public was invited, or at any rate licensed, "to go." The question of payment for entrance to the zoo was dealt with in this way. It was said there was no evidence that a separate charge was exacted for persons visiting the zoo; and it was said that the evidence was consistent with the view that a person who had paid his shilling to go to the circus thereby became entitled to go to the zoo and that, therefore, the little girl being in the zoo was in a place where she was entitled to be in any circumstances. I do not myself think that that argument can be sustained, and for these reasons. Assuming either that entrance to the zoo was free or that the shilling paid for entrance to the circus also secured admission to the zoo, the proper inference from the plan appears to me to be that the only persons whom the proprietors were inviting or licensing to enter the zoo were persons who entered through the authorized entrance. Therefore, a person who, for the purpose of visiting the zoo, entered by some other entrance, could not in general be regarded as an invitee or a licensee. That appears to me to be a sensible conclusion, having regard to the lay-out of the zoo, when pains have obviously been taken, in a rough and ready way, to stop persons getting into the zoo otherwise than by the authorized entrance. It must be remembered, in dealing with a concern of this kind which may be attended by a crowd of people, that it is very important that the proprietors should have power by means of an entrance at which an attendant can be stationed to control the entrants.

C. A.

1948

PEARSON v. COLEMAN BROTHERS.

Lord Greene M.R.

The third argument is a very different one, and one on which, in my opinion, the plaintiff is entitled to succeed. Whatever would have been the position of the plaintiff if she had arrived at the runway by the route she took merely out of curiosity, the position is very different when the explanation of her presence at that point is that she arrived there owing to the necessity of relieving herself. There was no place provided by the defendants for any such purpose, and, therefore, it has been argued that, whatever her status would have been in other circumstances, she must be regarded on the facts of this case as being rightfully there by implied licence or invitation. These facts are that she was looking for a quiet place in which to relieve herself; that she had sought for one and could not find one; and that the particular place was obviously, from the photograph, such a quiet place as one would expect a little girl of seven with ordinary delicacy of feeling in such matters to select. There was one argument put forward by Mr. Rees-Davies, which attempted to meet that argument half way. He said that there was no evidence that when she was at the point where she was mauled—crawling either under the runway from the north or through the fence from the south—she had not already done what she left the tent to do. It appears to me that the learned judge entirely destroys that argument by his findings. He makes it quite clear, to my mind, that she had not done what she wanted to do and that she went to the point where she was injured for the very purpose of performing that particular act. The judge refers to her coming up to the fence on the south "in the course "of her search." The "search" was the search for a quiet corner to which she could retire, and there is not a particle of suggestion anywhere in the judgment that that search was satisfactorily concluded before she came to the place where she was injured.

This is not a case, as it seems to me, which is similar to the common class of case where children being on A's land or on the public highway go on to B's land in circumstances such that they would normally be trespassers. In that class of case the facts may lead the court to infer an invitation or a licence by the owner of the land to go on to his land. Such an inference, of course, is much more easily drawn where with the knowledge of the landlord children have been in the habit of trespassing on his land. In cases of that kind, the problem is to find out the point in place or time at which the children become trespassers. Here it seems to me that the problem is entirely different. The problem is not to find out when the little girl became a trespasser, but to find out when she ceased to be an invitee. She began as an invitee; she paid her shilling; she was invited to a place where anyone would know that among the spectators in a circus of that kind there would be bound, from time to time, to be people who would find it necessary to go outside somewhere and relieve themselves. No place was provided for that purpose. It does not surprise me or shock me in the least to suppose that at what is in effect a country circus put down in a field the patrons are expected to look after themselves and find some place where they can satisfy their needs. This is not a London cinema, it is a country circus in a field, and the rustic and primitive method of dealing with such an emergency would be perfectly natural and what the proprietors would contemplate. That being so, we have got the case not of an adult but of a little girl confronted with such a necessity doing what was the natural thing for her to do. She goes outside the circus tent and finding herself outside, she looks, as the judge says, for a quiet place, and she does not find one until she comes to the runway, either from the north or from the south. What does she find when she gets there? She finds, as the photograph shows, what would to a little girl of seven be the ideal place for her purpose, a little space into which she could crawl, do what she wanted to do, and then come out without being seen. I have mentioned what seems to me to be the crucial fact, that she starts by being an invitee, and the argument was that at a certain point she ceases to be an invitee and becomes a trespasser. That such a thing can happen, of course, is perfectly manifest, but the question is: Did it happen in this case? The learned deputy judge, if I follow his judgment correctly, dealt with the first two arguments that I have mentioned. He rejected the first one, that it was sufficient for the plaintiff to prove damage, and he referred to the well-known case of *May* v. *Burdett* (1) and that of *Glasgow Corporation* v. *Taylor* (2) where the child ate some poisonous berries in a public park. He found that neither of those cases assisted the plaintiff on the first branch of her argument. Then comes what I read as his ground for rejecting the second one. He describes the argument in this way: "It was further contended that the plaintiff was an invitee

---

(1) 9 Q. B. 101.

(2) [1922] 1 A. C. 44.

C. A.

1948

PEARSON
v.
COLEMAN
BROTHERS.

Lord Greene
M.R.

"to the whole of the circus and zoo outlay." That argument he rejects. He read *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (1), which he said was not referred to in argument, and having read that case he held, following Lord Hailsham's well-known words in that case, "that there was no invitation, "express or implied for the plaintiff to approach or pass "under the runway." He was finding, really, on the authority of *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (1), that the plaintiff on the facts must be regarded as a trespasser when she was in the place where she was injured. *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (1) was, however, a case of a quite different character. It was a case of the class, to which I referred a little while ago, of children, not starting as invitees on the defendant's land but coming in from the outside, at any rate prima facie, as mere trespassers. The problem there, as I have said, was the problem of finding out at what point in time or place did they cease to be trespassers. The problem here is to find out at what point in time or place did the plaintiff cease to be, what she started by being, an invitee on the defendants' land. I cannot help thinking that, with all the care which the deputy county court judge obviously paid to this case, he misdirected himself in thinking that *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (1) was an authority which, on the facts, justified or compelled him to find that the plaintiff was a trespasser at that particular stage of her search. Turning to the language that he used, he says: "There was no invitation "express or implied to the plaintiff to approach or pass under "the runway. I hold that the plaintiff was not at the point "where the injury occurred present there with the leave and "licence of the defendants. I further hold that at the time "she approached and endeavoured to pass under the runway "the plaintiff became a trespasser and disentitled from "recovering damages." I read that as meaning that down to the point when she was close to the runway she was acting in accordance with the original invitation. Whether or not that is what the learned judge meant, that appears to me to be the only possible conclusion from the facts: She was invited to a place where there was no lavatory, seeking for one and moving within the part controlled by the defendants, and not finding any place, she arrived near the runway. It seems to me impossible then to say that she was a trespasser the moment she got out of the circus tent. What was she to do? Mr. Rees-Davies could only suggest that she might have found an attendant. We do not know what attendants were there, where they were located, and whether it was possible for a little child to get hold of one in what I dare say was a crowded circus tent. She could not remain where she was, and, therefore, it seems to me the only proper inference was (and I think the judge is drawing it) that, at any rate up to the crucial point when she decided to crawl under the runway, she was there pursuant to the original invitation.

---

(1) [1929] A. C. 358.

Now there comes what, to my mind, is the really important point and, from the legal point of view, the most interesting part of this case. The defendants have got two adjoining pieces of land, the circus and the zoo, and there was an invitation to these children to go to the circus. A person who has two pieces of land and invites the public to come to one of them can, of course, if he choses, limit the invitation to that one; but if the other piece is contiguous to that one and he does not indicate to his invitees that his invitation is confined to the one piece of land, he cannot be surprised if they treat his invitation as extending to both pieces. In my opinion, if a land owner is minded to make part of his land a prohibited area he must indicate this to his invitees by appropriate means. It is no good his coming afterwards and saying "You were not allowed to go on that piece" if, in point of fact, he has done nothing, or nothing adequate, to show that the second piece of land is a prohibited area. Whether or not proper and sufficient steps have been taken to delimit the prohibited area must I apprehend depend on the facts in each case. Looking at the zoo, which in this case is said to be a prohibited area, I find what I have described as a rough and ready manner of marking it off and indicating that nobody ought to go in there unless he goes through the proper entrance. It is a rough and ready method of doing it and to an adult it might very well be regarded as sufficient indication that the area of the zoo is a prohibited area and is not to be accessible to anyone who does not go through the proper entrance. But we are not dealing here with an adult but with a child who is not moving about out of mere curiosity or without any reason. We are dealing with a child in a condition which the proprietors must have contemplated as reasonably possible, namely, the condition of being under an urgent necessity to find a quiet place in which to relieve herself.

C. A.
1948

PEARSON
v.
COLEMAN
BROTHERS.

Lord Greene
M.R.

I ask myself, having regard to the fact that among the invitees of the defendants there were likely to be children needing to relieve themselves, whether in relation to that class of person, the steps taken at the point in question to delimit the prohibited area of the zoo were adequate. In my opinion, the facts speak for themselves. So far from indicating sufficiently to a child bent on such an errand that she must not go in, there is displayed before her what, from the photograph, is clearly not a prohibition, but a temptation. It is quite obvious that to a little girl seeking for a quiet place here is the ideal quiet place. It seems to me quite impossible to say that the prohibited area had, as regards a child in those circumstances, been adequately marked off by the defendants from the area into which the child was entitled to go. However the matter might have stood with regard to somebody who came on to the field as a trespasser and chose to go into that place, the fact that the little girl started as an invitee can only lead to the conclusion that the invitation extends, impliedly at least, to a place to which she would reasonably go to meet her need.

It will be observed that I have been careful to consider all the relevant facts of the case as they appear to me—the child's need, her age, the absence of any lavatory, the fact that she made a circuit round the tent and found nothing, and the fact that she did find a very attractive place in the end. The combination of all those facts is what leads me inevitably to the conclusion that the defendants in this case cannot succeed. I say nothing of what the position would have been in the case of an adult who had found himself in a similar need. If he had followed the same route as this girl and had crawled through the fence or under the runway, any claim by him might very well have been met with the answer "To you, "an adult, it was quite sufficiently indicated that this was "a prohibited area." It can scarcely be necessary to stop up every hole through which an adult could crawl; adults are not expected to crawl. That might have been the answer in that case, but I only refer to it as showing the importance of paying due regard to all the facts of this case. Again I say nothing about what would have been the conclusion if this little girl, being bored with the circus performance, had chosen to go out from curiosity and wandered into the zoo. The plaintiff was under a compelling need, for the satisfaction of which a convenient and inviting aperture was left in what was intended to be an enclosure of the zoo ; and she is, in my opinion, justified in saying that the invitation in her case extended to this point.

I think I have said sufficient to explain why in my opinion the appeal is entitled to succeed. I do not think that I have failed to refer to any of the points made by Mr. Rees-Davies, but if I have my brethren will, no doubt, deal with them. The conclusion I have come to is based on what seems to me to be the only possible inference in law on the facts of this case. Accordingly, the plaintiff is entitled to succeed and to have judgment for the amount of damages found by the judge. It is, fortunately, a small amount because the little girl did not suffer any really serious injury from this unfortunate occurrence.

WROTTESLEY L.J. I agree. As to the question whether a fresh trial should be granted, I have nothing to add to that which has fallen from my Lord. It is difficult to imagine a less meritorious application in all the circumstances of the case.

I turn to what I may call the merits of the appeal. In two respects this case differs from the facts usually to be found in decided cases relating to children who are prima facie trespassers and in the course of their trespass get hurt. We start with a child who was clearly invited, on terms of paying, to an entertainment provided for children, and others, by the defendants. At the other end of the story, there was within the general lay-out of the premises where the entertainment was provided a dangerous animal, a lion. If the child was lawfully at the point where she was struck by the lion, it is unnecessary to prove that the injuries were due to negligence on the part of the defendants ; to that extent the defendants were responsible. Those who keep such animals do so, in that sense, at their peril.

On the facts narrated by my Lord, I have also come to the conclusion that the learned county court judge in finding, in his very careful judgment, that there was no invitation express or implied, did not apply his mind to the true test in the peculiar circumstances of this case, the true test being : Did this child, having been invited on to these premises, behave like a normal child and reasonably ? We know that she tried to find what she called a lavatory, and we know that she could not find one. Those were her very words and none, indeed, is shown on the plan. We also know that in the search she came within range of a lion's paw and that she got there in one of two alternative ways. She either walked round the top or north side of the circus tent and round the zoo lager, and so came to a hole in a skeleton fence without rungs, the course which the learned judge thought the more probable in the circumstances of the case, or else, having gone round the tent, she came to the place indicated on the photograph, from which she could pass under the runway and so reach the spot where she was hurt. It does not, as the learned judge said, really matter which route she took. In either event she clearly came naturally and reasonably on a secluded corner such as she wanted, and there she was mauled.

Of the various cases cited to the court, the one which appears to me to come nearest to the facts of this case is *Gould* v. *McAuliffe* (1), a decision of this court. That was the case of an adult, while the case which we have before us is that of a child, and in that sense an a fortiori case. If the plaintiff in that case could be said to have behaved reasonably, then it seems to me this child must also be admitted to have behaved reasonably. Something was said about the fact that this child had with her an elder sister, aged about twelve years. It does not seem to have occupied the judge's mind at all, but even if she had an elder sister with her, acting as what is often called a little mother, there is no reason to suppose that she would have guided this child to any spot other than that to which the child guided herself. So that in the result there was, as in the case of *Gould* v. *McAuliffe* (1), an implied invitation to the plaintiff to do what in fact she did—those are the very words in the judgment of Scott L.J.—and if not invited she was at least licensed to wander and find, if she could, a secluded place.

Another argument of Mr. Rees-Davies was that there was no duty imposed on the defendants to supply lavatory accommodation. I agree with him, but in the absence of such accommodation the owners must expect their patrons to wander and look for a suitable secluded place. It is to be noted in this case that the learned county court judge did not find that this child became a trespasser in the course of her search. In fact, he found that she did not become a trespasser until the time at which she approached, and intended to pass under, the runway. She was, therefore, even on the learned county court judge's view, not a trespasser but an invitee, or, at least, a licensee right up to that time. It appears to me clear that the mere fact that this child passed through that hole in the fence could not render her a trespasser, in the circumstances of this case, engaged as she was in the search for a secluded spot, still less if she crept under the runway, as she did if she came from the north side of the plan. That is clear from the photograph which is produced and referred to in the judgment of the deputy county court judge.

---

(1) [1941] 2 All E. R. 527.

EVERSHED L.J. I also agree. Since we are differing from the conclusion of the deputy county court judge and the case is not without legal interest, I add briefly the reasons for my conclusion.

It is to be observed that this case must be decided on its own special and particular facts. Those facts are rendered all the more special and particular by reason of the neglect on the part of the defendants to defend the action or to appear at its trial. The only witnesses, therefore, were the plaintiff, a small child of seven, whose recollection of the incident was not, perhaps naturally enough, very extensive, and her father, not present at the time, who had a sketch plan of the premises. The case must be decided upon this limited material. The facts have been fully stated by the Master of the Rolls and I do not desire to repeat what he has said. There is no question here of any issue or dispute as to the facts or of our being asked to depart in any way from a finding of fact by the county court judge. As I follow his judgment, he carefully stated the matters of fact, and decided, as a matter of law, that the plaintiff was disentitled to relief by reason of the inference he drew that at the point where the accident occurred she was a trespasser. He arrived at that conclusion after stating the classification by Lord Hailsham of persons visiting premises in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (1). As I follow his judgment, he noted the lay-out of the zoo and came to the conclusion that any person who had got into the zoo otherwise than through the proper entrance for any purpose must be a trespasser at the point where this accident occurred. If, for example, an adult had crept under the canvas screen in order to view the lions' cage without going through the proper entrance so as to avoid any risk of having to pay an entrance fee he must have been found to be a trespasser, and

(1) [1929] A. C. 358.

C. A.
1948

PEARSON
v.
COLEMAN
BROTHERS.

Evershed L.J.

it must therefore follow that all persons, whatever their age or purpose, must also be trespassers. In my view, that was an erroneous conclusion of law. It seems to me that if I invite persons on to my land, I cannot say that an invitee becomes a trespasser at some part of that land if that person has gone on to that part in the reasonable and natural course of events, having regard to all the circumstances including the age of the invitee and the purpose for which he goes to that part of the land. If I take steps clearly to mark off and distinguish that part of my land as what the Master of the Rolls has called a "prohibited area," then it may well be that any person of whatever age found thereon would be a trespasser, because in those circumstances it would not be reasonable or natural for that person to have gone there. But there was in this case manifestly no such delimitation of a prohibited area, and it seems to me, therefore, that this child, who had begun as an invitee, did not become a trespasser by reason of her going to this place for the purpose she did and getting there by a means of access which was perfectly natural for a child.

It follows, in my judgment, that the defendants are liable, as keepers of a dangerous beast, for a breach of their duty to the plaintiff to keep that beast so confined as to be incapable of doing damage.

Appeal allowed.

Solicitors: *Beaumont, Son & Rigden, for Charles E. White, Reynolds & Beecroft, Clacton-on-Sea; Vivash Robinson & Co.*

H. C. G.

1948
July 15, 21.

Lord Goddard C.J.

CARLISH *v.* EAST HAM CORPORATION AND EDWARDS.

Emergency legislation—Requisitioning of unoccupied houses—For the inadequately housed—Evidence of delegation of power to requisition—Letter from Ministry of Health purporting to be written on behalf of the Minister—Letter authorizing requisitioning of part of house—Part not specified in letter—Defence (General) Regulations, 1939, reg. 51—Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 62), s. 7.

A town clerk received a letter from the Ministry of Health stating that the writer, A. W. K., by whom it was signed, was directed by the Minister of Health to refer to a telephone conversation between officers of the council and the Ministry and to say that he thereby delegated to him, as clerk, his functions under reg. 51 of the Defence (General) Regulations, 1939, for the purpose of requisitioning part of a named dwelling-house for rehousing purposes, and consent was thereby given to such requisitioning. The part of the dwelling-house to be requisitioned was not specified in the letter. The town clerk requisitioned a part of that dwelling-house.

Held that the production of the letter was prima facie proof of delegation, and that the delegation and the requisition were valid.

ACTION for a declaration that the purported requisitioning by the defendants on September 3, 1947, of No. 124 Barking Road, East Ham (excluding shop and shop parlour), of which premises the plaintiff was owner, was void and also for an injunction restraining the defendants from taking possession of the premises.

By reg. 51 of the Defence (General) Regulations, 1939, a competent authority, e.g., the Ministry of Health, if it appeared to that authority necessary or expedient, was authorized to take possession of any land which by the reg. 100, includes houses and parts of houses, for any of the purposes specified in sub-s. 1 of s. 1 of the Supplies and Services (Transitional Powers) Act, 1945, and might give such directions, as appeared to the competent authority to be necessary or expedient, in connexion with the taking of possession of that land, and by sub-s. 5 it was provided that a competent authority might to such extent and subject to such restrictions as it thought proper delegate all or any of its functions under paras. 1 to 3 of the regulations to any specified person or class of persons. On July 20, 1945, for the purpose of providing accommodation for people without homes or who were unsatisfactorily housed, the Minister of Health had delegated his powers under this regulation to local authorities or their officers giving them power to take possession of houses, but subject to certain conditions which have been varied from time to time.

On September 1, 1947, a letter from the Ministry of Health was sent to the town clerk of the county borough of East Ham in these terms:—" Defence (General) Regulations, 1939. " 124 Barking Road. I am directed by the Minister of Health " to refer to the telephone conversation between officers of " the council and this Ministry and to say that he hereby " delegates to you as clerk, his functions under reg. 51 of the " Defence (General) Regulations, 1939, for the purpose of " requisitioning part of the above-mentioned premises for "rehousing purposes and consent is hereby given to such "requisitioning. If requisitioning action is taken, the date of "such requisition should be notified to this department. "I am, Sir, Your obedient servant, A. W. Kent."

On September 3, 1947, a requisitioning notice was served on the plaintiff in the following terms by the town clerk:— "Take notice that in exercise of the powers delegated to me "by the Minister of Health under and by virtue of reg. 51 of "the Defence Regulations, 1939, I have this day taken "possession of the premises known as 124 Barking Road in "the county borough of East Ham, excluding shop and shop "parlour."

L. A. Blundell for the plaintiff. The defendants have to prove a valid delegation of requisitioning power to the town clerk. The letter of September 1, 1947, relied upon by the defendants, is not a letter from the Minister but is from another person signing himself " A. W. Kent " informing the town clerk what the Minister has decided to do. There was no act by the Minister delegating his power to the town clerk. Furthermore, the delegation contained in the letter of September 1, 1947, is void for uncertainty. It is not an authority to requisition the whole building, but only to requisition part, and it does not specify which part nor does it confer on the town clerk any authority to specify which part. An absolutely clear delegation is required. A citizen who has his house taken away from him is entitled to have the delegation made in strict compliance with the law: *Allingham and Anor.* v. *Ministry of Agriculture and Fisheries* (1). Moreover, the Minister had already delegated extensive power of requisitioning to the town clerk by a series of circulars which enabled the town clerk to requisition unoccupied houses subject to compliance with certain conditions. To the extent that the Minister has already delegated his power he has denuded himself of that power: *Blackpool Corporation* v. *Locker* (2). There is no withdrawal of the previous delegation. Therefore, a purported delegation in such wide terms as to go beyond the residuary power now remaining in the Minister, is void.

Squibb for the defendants. The letter of September 1, 1947, which the defendants produced, established the delegation. It was a document purporting to be an instrument issued by a Minister in pursuance of reg. 51, and signed on behalf of the

(1) (1948) 64 T. L. R. 290. (2) [1948] 1 K. B. 349.

1948

CARLISH
v.
EAST HAM
CORPORATION AND
EDWARDS.

Minister within the meaning of s. 7 of the Emergency Powers (Defence) Act, 1939. As such it was received in evidence and, until the contrary is proved, it is to be deemed to be an instrument issued by the Minister. That is the regular way in which such an authority to requisition premises is proved. See *Carltona, Ld.* v. *Commissioners of Works and others* (1). The Minister had already delegated to the town clerk his power of requisitioning unoccupied premises, with a view to their occupation by the inadequately housed, subject to certain conditions. By the letter of September 1, 1947, the Minister withdrew the conditions in the case of these premises. There was no necessity for the Minister to specify which part of the house should be requisitioned by the town clerk. The selection of this part of the house he could and did leave to the town clerk. It is clear from the definition in reg. 100 of the Defence (General) Regulations, 1939, that the Minister, and so the town clerk, could requisition part of a house, since by that regulation "land" includes "parts of houses or "buildings."

L. A. Blundell in reply. The letter dated September 1, 1947, does not purport to be an instrument made or issued by the Minister, nor does it purport to be signed by or on behalf of the Minister. Therefore, it cannot be received in evidence under s. 7 of the Emergency Powers (Defence) Act, 1939, and the defendants have not proved any delegation of requisitioning power to the town clerk. The case of *Carltona, Ld.* v. *Commissioners of Works and others* (1) has no application.

Cur. adv. vult.

July 21. LORD GODDARD C.J. The plaintiff in this action claims a declaration that the purported requisitioning by the defendants on September 3, 1947, of the premises (excluding shop and shop parlour) known as 124 Barking Road, in the county borough of East Ham, is void and also an injunction restraining the defendants from taking possession of the said premises.

By the letter of September 1, 1947, the Minister has purported to delegate his powers to the town clerk of East Ham in respect of the premises therein mentioned without any conditions. It is in effect an ad hoc delegation and the questions that have been argued in this case are whether or not there has been proved a delegation by the Minister and whether the delegation is intra vires, or void as being too

(1) [1943] 2 All E. R. 560.

vague. Mr. Blundell contended that mere production of the letter is not enough to prove delegation, but, in my opinion, this point is concluded by s. 7 of the Emergency Powers (Defence) Act, 1939, which is the Act giving statutory authority to the Defence Regulations. That section provides that every document purporting to be an instrument made or issued by any Minister or other authority or person in pursuance of any provision contained in, or having effect under, Defence Regulations, and to be signed by or on behalf of the said Minister, authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by that Minister, authority or person. The regulation does not require the delegation of the Minister's authority to be made in any particular form and, in my opinoin, this letter, which purports to be written on behalf of the Minister of Health, is an instrument whereby he delegates his functions to the town clerk for the purposes mentioned therein.

It was, however, contended that this delegation is invalid because it refers to the requisitioning of part of the premises mentioned in the letter and does not say which part. In my opinion, it is clear that the Minister himself could requisition part of a house and I can find nothing in any regulation, nor has my attention been brought to anything which would indicate that only a complete house can be requisitioned. If, therefore, the Minister can himself requisition part of a house, it seems to me clear that he can delegate that power to a local authority, or an officer of theirs. If the delegation had been for the purpose of requisitioning the whole or any part of the house, I do not think any question could have arisen as to its validity. It seems to me, therefore, that if he delegates his power to requisition part only, he leaves it to the person whom he has appointed as his delegate to requisition as much or as little of the house as he thinks fit. In my opinion, a valid delegation has been proved and it was, therefore, in the power of the town clerk to issue the notice in question, and in consequence this action fails and must be dismissed with costs.

Judgment for the defendants.

Solicitors for the plaintiff: *Spiro and Steele.*

Solicitors for the defendants: *Pritchard, Englefield & Co., for R. H. Buckley, Deputy Town Clerk, East Ham.*

C. G. M.

LLEWELLYN *v.* HINSON.

LLEWELLYN *v.* CHRISTMAS.

C. A.

1948
May 5, 6;
June 3.

Scott and Asquith L.JJ. and Jenkins J.

Landlord and tenant—Rent restrictions—Definition of " dwelling-house " —Two flats on same floor of house let separately to two respective tenants—Right of each tenant to use kitchen, bathroom and w.c. on same floor—Whether sharing of kitchen prevented either flat from coming within statutory definition of " dwelling-house "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1.

H. and C. were respective tenants of two flats in Birmingham. The annual rateable value of neither flat exceeded 75*l.* Each tenant had the exclusive possession of certain living rooms of the particular flat which was let to him but they shared in common a kitchen, a bathroom and a w.c.

Held, on the authority of *Neale* v. *Del Soto* [1945] K. B. 144, *Sharpe* v. *Nicholls* [1945] K. B. 382, and *Cole* v. *Harris* [1945] K. B. 474, that (1.) a kitchen was a living room and therefore each tenant had the use jointly with another person of a living room; (2.) the sharing by a tenant of a living room with any other person, whether or not he was the landlord, prevented him from being a tenant of a " house let as a separate dwelling or part " of a house so let " within the meaning of s. 16, sub-s. 1 of the Rent and Interest Restrictions (Amendment) Act, 1933; (3.) therefore, neither of the flats was controlled by the Rent Restriction Acts.

APPEALS from Birmingham county court.

The two appellants, G. A. Hinson and S. J. Christmas, were the respective tenants of two flats on the second floor of a dwelling-house in Birmingham. The rent paid by the former was 1*l.* 10*s.* 0*d.* a week and by the latter 1*l.* 7*s.* 6*d.* a week. Each tenancy was a four-weekly tenancy. The annual rateable value of each flat did not exceed 75*l.* a year. Each appellant had the exclusive possession of certain living rooms but they shared in common a kitchen, a bathroom and a w.c.

On May 23, 1947 the landlord gave notice to quit to each appellant which would, apart from the provisions of the Rent Restriction Acts, have been a valid notice. The appellants refused to give up possession and the landlord accordingly sued for possession. Each appellant contended that the flat of which he was the tenant was a " dwelling-" house " within the meaning of s. 16, sub-s. 1, of the Rent

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

C. A.
1948

LLEWELLYN
v.
HINSON.

LLEWELLYN
v.
CHRISTMAS.

and Mortgage Interest Restrictions (Amendment) Act, 1933 (1) The county court judge on the authority of *Neale* v. *Del Soto* (2), *Sharpe* v. *Nicholls* (3) and *Cole* v. *Harris* (4) held that neither flat was a " dwelling-house " within the meaning of s. 16, sub-s. 1 ; therefore, it was not controlled by the Rent Restriction Acts and the landlord was entitled to possession. He held that the ratio decidendi of those three cases was that an agreement whereby the tenant was required to share one or more living rooms with someone else prevented the house or part of the house which was let from coming within the foregoing definition of a " dwelling-house," and he also held that a kitchen was a living room. The appellants contended that in each of those three cases the tenant was required to share one or more rooms with the landlord and a different principle was applied to that kind of sharing from the principle that should be applied to the sharing of rooms between two tenants.

J. Platts Mills and *Claud Barry* for the appellants, the tenants. The particular requirements for a tenancy are that the tenant has, as against the landlord, the right to say to the landlord that he is a trespasser if he comes on to the premises. That is why the courts have insisted that there was not a controlled house unless there was a tenancy given by the landlord to the tenant which is exclusive as against the landlord. There cannot be a letting which provides that a tenant can share with the landlord any part of that which is let. But the tenancy need not be exclusive as against other persons. A demise to A. and B. jointly would be a perfectly valid demise. The very essence of the protection given by the Rent Restriction Acts is that there shall be a separate dwelling-house, and the fact that other amenities are added to it will not prevent a dwelling-house from being affected by the Rent Acts. There may be all sorts of amenities attached to a flat, namely ornamental gardens, swimming pools, etc. These added amenities would not have any influence on the question whether the premises were controlled or not. In the letting

---

(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, sub-s. 1 : " In this Act, " unless the context otherwise " requires . . . . 'Dwelling- " ' house ' has the same meaning " as in the principal Acts, that is " to say, a house let as a separate " dwelling or part of a house being " a part so let . . . ."

(2) [1945] K. B. 144.

(3) [1945] K. B. 382.

(4) [1945] K. B. 474.

C. A.
1948

LLEWELLYN
v.
HINSON.

LLEWELLYN
v.
CHRISTMAS.

of a flat, all that is necessary is to have one room, the possession of which is exclusive as against the landlord: *Field* v. *Gover* (1). There can be a separate dwelling even though there is a right to use a room in common with another person, provided he is not the landlord. *Neale* v. *Del Soto* (2) has no bearing on the case of two tenants sharing a room with each other. There is no section in the Acts which regulates any relation except that of landlord and tenant. The policy of the Acts is to restrain landlords in their relations with their tenants. If the county court judge's decision is right, it is open to any landlord to make it a term of the tenancy agreement that a tenant shall share the kitchen with another tenant and by that means evade his duties under the Acts, and if this be correct, then any letting from now on could be made by the landlord to be an uncontrolled letting. In *Mann* v. *Neville* (3) Judge Konstam held that a house was controlled where the tenants shared a room together. Judge Konstam in that case gave as some of his reasons for his decision the fact that if his decision had not been what it was, a landlord could get out of the Act by making a provision for the sharing of one or more living rooms by two or more tenants.

The passage in the judgment of Morton L.J. in *Cole* v. *Harris* (4) which seems to help the respondent was as follows: "I think that the true test where the tenant has the exclusive "use of some rooms and shares certain accommodation with "others is as follows: There is a letting of part of a house as "a separate dwelling within the meaning of the relevant Acts, "if, and only if, the accommodation which is shared with "others does not comprise any of the rooms which may fairly "be described as 'living rooms' or 'dwelling rooms'." I have two observations to make about that passage. The first is that although the Lord Justice does use the expression, which is "shared with others," nevertheless that expression was not necessary to the decision of the case because in that case the rooms were shared with the landlord and therefore the expression, which is "shared with others" is really obiter. Secondly the expression "dwelling rooms" is a most peculiar expression because there is no such thing as a "dwelling "room." If a man lives in one room then it is a dwelling-house. A man does not talk about "dwelling in my dining "room." They also referred to *Prout* v. *Hunter* (1).

---

(1) [1944] K. B. 200.

(2) [1945] K. B. 144.

(3) Estates Gazette, May 1946, 490.

(4) [1945] K. B. 474, 485.

Richard O'Sullivan K.C. and *L. A. Blundell* for the respondent, the landlord. This case depends upon the interpretation of s. 16, sub-s. 1, of the Act of 1933 and that involves the question—"What is the meaning of a separate dwelling-"house"? In *Kenyon* v. *Walker* (2) Morton L.J. stated the principle which was accepted by MacKinnon L.J., namely, that what the court had to consider was the meaning of the words "house let as a separate dwelling." Counsel for the appellant says that the passage in the judgment of Morton L.J. in *Cole* v. *Harris* (3) upon which I rely, was merely obiter. I do not agree with that The distinction between *Neale* v. *Del Soto* (4) and *Cole* v. *Harris* (3) was that whereas in the former case there was the sharing not only of a garage, bathroom, w.c., coal-house and conservatory but also the sharing of a kitchen, which the court held was an important room—in *Cole* v. *Harris* (3) there was only the sharing of a bathroom and a w.c. It was held in the former case that the house was outside the Acts, but it was held in the latter case that the house was within the Acts because neither a bathroom nor a w.c. was a living room. Morton L.J. gives reasons why the statute should be applied in *Cole* v. *Harris* (3) and why it was not applied in *Neale* v. *Del Soto* (4) and these reasons are given in the passage of his judgment in *Cole* v. *Harris* (3), to which I have already referred. He used the expression "accommo-"dation which is shared with others"—that means, accommodation which is shared not only with the landlord but with others. He further on said that "the plaintiff does not share "any living room with other people." As a matter of fact in *Cole* v. *Harris* (3) the accommodation was shared not only with the landlord but with another tenant. If there is a letting in which one or more of the living rooms have been shared with someone else it is not a letting within the Acts. As long as there is a sharing with someone else it does not matter whether the sharing is or is not with the landlord. The principle contained in s. 16, sub-s. 1, is that there is no separate dwelling-house where any living room is shared. The dispute in *Cole* v. *Harris* (3) was essentially on the question whether the rooms which were shared were living rooms. Morton L.J. was

(1) [1924] 2 K. B. 736.
(2) (1946) 62 T. L. R. 702.
(3) [1945] K. B. 474, 485.
(4) [1945] K. B. 144.

concerned with the question whether the rooms were let as a house or part of a house, as a separate dwelling-house. If any essential living rooms are not part of the letting of rooms with exclusive possession then the house of which they form part is not within the Act. It is quite irrelevant to ask with whom the rooms are shared. The statute provides that the interest of the tenant shall be an interest which gives him a right to a separate dwelling-house and the sole question to ask is :—" Is that a right to a separate dwelling-house or is " it not ? " Supposing A. B. and C. are sharing a house together and A. is the landlord and the house has been controlled by the Acts and without any sharing having taken place was once let to a tenant who has given up possession ; supposing the landlord shares with the two other tenants two essential living rooms, then counsel for the appellants would concede that as A. shares essential living rooms with B. and C., then that sharing makes the house come outside the Acts, but counsel for the appellants would also say that if A. assigns his interest in the possession of the house to another man, then that fact would make the house come back again within the Acts. If one of the tenants goes out and the landlord come back again, then according to counsel for the appellants the house becomes de-controlled again. I submit that the legislature never intended the Acts to have such results. If it be held that the Acts apply in certain cases and not in other cases, surely it is because the question is whether the house has, or has not, been let as a separate dwelling-house. They also referred to *Sharpe* v. *Nicholls* (1).

Platts Mills in reply. The crucial point is : What is the test of a separate letting ? I submit that what was laid down in *Neale* v. *Del Soto* (2), *Cole* v. *Harris* (3) and *Kenyon* v. *Walker* (4) was not the question of principle but a question of degree. In *Neale* v. *Del Soto* (2) is was expressly stated that this question was a question of degree. In that case one of the main factors influencing the minds of the members of the court was the consideration of the number of rooms which were being shared and Morton L.J. said that it would be a misuse of language to say that two rooms and nothing more were let as a separate dwelling-house. It, therefore, follows that the court in the *Del Soto* (2) case merely considered the question as a question of fact only. The cases of

(1) [1945] K. B. 382.
(2) [1945] K. B. 144, 147.
(3) [1945] K. B. 474.
(4) 62 T. L. R. 702.

C. A.
1948
LLEWELLYN v. HINSON.
LLEWELLYN v. CHRISTMAS.

Neale v. *Del Soto* (1) and *Cole* v. *Harris* (2) must be dealt with only in accordance with the facts of each case and should not be binding in a case like this where the facts are essentially different. The Rent Restriction Acts only deal with the relations between landlord and tenant. If there are two points of view open to the court about certain words, those words should be construed in such a way as to give effect to the Acts and not in such a way as to defeat them.

Cur. adv. vult.

June 3. The judgment of the court was delivered by ASQUITH L.J.: These appeals proceed on facts which are for legal purposes identical, and were accordingly heard together. It may be convenient to state at the outset the point of law which both of them raised. The question was in each case whether the tenant was protected by the Rent Restriction Acts, having rgard to the following facts. In each the tenant had under his tenancy agreement, been given the exclusive possession of certain rooms, plus the user, jointly with other tenants, of certain other accommodation, including the kitchen. In the line of cases initiated by *Neale* v. *Del Soto* (1), and followed up by *Sharpe* v. *Nicholls* (3) and *Cole* v. *Harris* (2) the Court of Appeal had to consider the legal implications of such a state of affairs. The protection of the Rent Restriction Acts only attaches (once a valid notice to quit has been given, as it had been in the cases referred to and in the cases under appeal now) to " dwelling-houses." A " dwelling-house " is defined under the provisions applicable to the present cases, by s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 : such definition not differing materially from that which applied in the case of *Neale* v. *Del Soto* (1) and the authorities which are derived from that case. Section 16, sub-s. 1, defines a dwelling-house as follows : " 'Dwelling-" 'house' has the same meaning as in the principal Acts, that " is to say, a house let as a separate dwelling, or a part of " a house being a part so let." When, therefore, a part of a house is let it must (to qualify as a " dwelling-house " and to attract the protective operation of the Rent Restriction Acts) be " let as a separate dwelling."

In the present cases, a " part of a house " was let to each of the defendant tenants, now appellants in the proceedings, in the sense that each under his tenancy agreement, was granted exclusive possession of certain rooms. But each was granted in addition the joint use of certain other rooms, namely, a bathroom, w.c. and kitchen. The issue is whether on these facts, each of the appellants had let to him a part of a house let as a separate dwelling. The learned county court judge held that they did not: and he based his decision on the authority of *Neale* v. *Del Soto* (1), and the Court of Appeal cases following and interpreting that decision. The question is whether he was right in so holding. We think he was right.

---

(1) [1945] K. B. 144, 147.
(2) [1945] K. B. 474.
(3) [1945] K. B. 382.

This court cannot consider whether *Neale* v. *Del Soto* (1) and its satellite cases were properly decided. It can only inquire what they in fact decided. About this there can in our view be little doubt. The gist of those decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (*a*) exclusive possession of a room or rooms, plus (*b*) user, jointly with some one else, of another room or other rooms which come under the description of a living room or living rooms, then the tenant cannot say that he is the tenant of a "house let as a separate "dwelling or part of a house being a part so let."

The ratio decidendi is that the "dwelling" of the tenant on the facts assumed consists of the totality constituted by (*a*) plus (*b*): and that part of the totality is not "separately" let to him, because the possession or user of it is to be shared by him with another: a state of affairs which is inconsistent with the word "separately," and indeed with the word "let" for both of these terms connote exclusive possession or enjoyment.

If this ratio were inexorably applied, it would exclude from the ambit and protection of the Acts all tenants who, being entitled to exclusive possession of one or more rooms, enjoyed under the terms of their tenancy joint user of any other accommodation or facilities whatever, for example of a w.c. a bathroom, a box-room, or a coal cellar. The decisions above referred to, by which this court is bound, reject this consequence; and limit the operation of the rule to cases in which the room shared is a "living room." Those decisions equally bind us to say that a "kitchen" is a living room and that even in cases in which the sharing of the kitchen is limited to access to the kitchen for purposes of cooking (*Kenyon* v. *Walker* (1)).

---

(1) [1945] K. B. 144.

In our opinion, in the case of *Cole* v. *Harris* (2), the Court of Appeal affirmed a principle which is fatal to the appellants in this appeal. The material passage from the judgment of Morton L.J. (as he was then)—(propounding a test accepted by MacKinnon L.J. in that case)—is as follows : " I think that " the true test, where the tenant has the exclusive use of some " rooms, and shares certain accommodation with others, is " as follows : there is a letting of part of a house as a separate " dwelling, within the meaning of the relevant Acts if, and " only if, the accommodation which is shared with others " does not comprise any of the rooms which may fairly be " described as 'living rooms,' or 'dwelling rooms.' To my " mind, a kitchen is fairly described as a living room."

Counsel for the appellants faced by this pronouncement (which was reaffirmed by the whole court in *Kenyon* v. *Walker* (1)) had no alternative but to contend that it was obiter. In so far as *Cole* v. *Harris* (2) decides that the sharing of a " living room " negatives the letting of a separate dwelling, and that the sharing of a non-living room does not, the statement is clearly not obiter. This was the very point in issue in that case. But it is suggested by the appellants that though this case decided that a " sharing " of a living room between landlord and tenant excluded the Acts, yet neither this nor any other case decided that a sharing of such a room as between one tenant and another had similar legal consequences. It is true to say that in *Neale* v. *Del Soto* (3) the " sharing " was between landlord and tenant : and that in substance that was also the position in *Kenyon* v. *Walker* (1), and in certain other cases.

Nevertheless, *Cole* v. *Harris* (2) would seem to be the key decision and to lay down a wider principle : In that case the shared accommodation was to be shared between the landlord, the defendant tenant, and another tenant or tenants. The language used by Morton L.J. (and acquiesced in by MacKinnon L.J.) draws no distinction at all between the " sharing " of accommodation between the tenant with the landlord, and a similar sharing between the tenant and other tenants.

This appears plainly in the passage quoted above, and as

(1) 62 T. L. R. 702.

(2) [1945] K. B. 474.

(3) [1945] K. B. 144.

clearly in passages which follow. Speaking of the tenant in that case Morton L.J. says (1): "He does not share any living "room *with other people*, though there are certain valuable "conveniences he shares *with other people*"; and on the next page (2) he speaks of a "licence to the plaintiff to use "the combined bathroom, w.c. and also the garden (for the purposes already mentioned) "in common *with other occupiers*." And again (2), "In either case the plaintiff does not share any "living room *with other people*." Neither MacKinnon L.J. (who expressly accepts the formula of Morton L.J.) nor Lawrence L.J. (who dissented only on the nature of the accommodation the sharing of which will oust the operation of the Acts) says a word to suggest that the tenant must share the material accommodation *with the landlord* for that result to ensue.

Apart altogether from the language in fact employed in this connexion by the Lords Justices, there would seem to be no logical distinction between the two types of "sharing" judged by the touchstone of s. 16, sub-s. 1 of the Act of 1933. When is a part of a house "let as a separate dwelling?" It is not "separately let" if part of the "dwelling" is shared with the landlord (*Neale* v. *Del Soto* (3)) not because it is with the landlord that that part is shared, but simply because it is shared by the tenant with some one, and therefore not separately let. It cannot matter logically with whom it is shared. This seems to be not merely an irresistible deduction from the language employed by Morton L.J. and MacKinnon L.J., but one implied in the logic of their decision in *Cole* v. *Harris* (4).

It was urged that such a construction as that which we favour would open to unscrupulous landlords a new loophole of escape from the intended operation of the Acts. A landlord has only to stipulate (as against a poor tenant who is in an inferior bargaining position) that the kitchen is to be shared, to rid himself of the shackles of the Acts. He can, as the law now stands, as easily throw off those shackles, by stipulating that he, the landlord, shall himself have joint user of the kitchen. In any case these consequences, be they grave or trivial, do not affect what alone a court of law can properly consider, namely, the true construction of the Acts as

(1) [1945] K. B. 474, 485.
(2) Ibid. 486.
(3) [1945] K. B. 144.
(4) [1945] K. B. 474.

C. A.
1948

LLEWELLYN
v.
HINSON.

LLEWELLYN
v.
CHRISTMAS.

determined by their language and decisions binding on that court. The rest is for Parliament.

The appeals must be dismissed.

Appeals dismissed.
Leave to appeal to the House of Lords granted.

Solicitors for the appellants: *Stafford Clark & Co., for Faber and Co., Birmingham.*

Solicitors for the respondent: *T. D. Jones and Co., for W. D. Clark Brookes and Co., Smethwick.*

C. A.
1948
Apr. 23, 26, 27, 28;
June 1.

Scott,
Bucknill and
Asquith L.JJ.

CLIFT *v.* TAYLOR.

Landlord and tenant—Trade or business carried on in demised premises—Claim for new lease—Adherent goodwill—Reasonableness—Good estate management—Premises required by landlord's firm—Whether required for landlord's "own occupation"—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4 *and* 5.

Distinguished.
PEGLER *v.* CRAVEN
[1952] 1 Q.B. 69

Distinguished.
PEGLER *v.* CRAVEN
[1952] 2 Q.B. 69

By lease in 1934 the landlord let to the tenant for fourteen years, expiring on Christmas Day, 1947, the ground floor of certain premises, the upper floors of which he occupied, as partner in a firm, for the purposes of his business as an auctioneer and estate agent. The tenant carried on a tea-shop on the leased ground floor. On December 20, 1946, the tenant gave notice to the landlord requiring a new lease under s. 5, sub-s. 1, of the Landlord and Tenant Act, 1927, and on March 17, 1947, by application to the tribunal under s. 5, sub-s. 2, claimed a right under s. 4 to compensation for loss of goodwill which she valued at 1,500*l.* During the currency of the lease the landlord's business had expanded to such an extent that he and his partners and staff found their headquarters above the tea-shop very cramped, and the landlord therefore refused a new lease on the grounds that he required the leased ground floor for his own occupation and that the grant of a new lease would not be reasonable or consistent with good estate management.

By s. 5, sub-ss. 1 and 3 (*a*), a tenant must, to be entitled to a new lease, prove that he is entitled to compensation under s. 4, but that such sum as could be awarded him under that section would not compensate him for the loss of goodwill that he would suffer if he removed to and carried on his trade or business in other premises. On the other hand s. 5, sub-s. 3 (*b*), provides that the grant of a new lease shall not be deemed to be reasonable if the landlord prove that he requires the premises for "occupation by "himself": or that the grant of a new lease would not be consistent with good estate management.

On appeal by the landlord from an order of the county court judge granting the tenant a new lease for seven years,

Held, that the only part of the tenant's goodwill which could be the subject of compensation was the net rental value of what adhered to the premises in the sense of enuring to the benefit of the landlord in form of increased rental value after the premises had returned into his possession; that the tenant, having failed to prove a right to compensation under s. 4, was not entitled to a new lease under s. 5; that occupation by a firm of which he was a partner was occupation by the landlord himself within the meaning of s. 5, sub-s. 3 (*b*) (i.), and the landlord had proved that the grant of a new lease would be neither reasonable nor consistent with good estate management.

APPEAL from a decision of judge of Yeovil county court.

The respondent, Mr. Richard Bulpin Taylor, an auctioneer and estate agent, carrying on business at No. 16, Princes Street, Yeovil, in 1934 granted to the applicant, Mrs. Lilian Mary Clift, a lease for fourteen years, expiring on Christmas Day, 1947, of most of the ground floor and of the cellar of the said premises, together with the joint use of the yard at the back. The respondent and his staff continued to use the upper floors of the house as offices. The use of the leased premises was restricted to that of restaurant proprietors, confectioners and caterers, and in fact throughout the applicant used it as a tea shop, where she sold confectionery largely produced in a bakehouse which she rented from another landlord. The tea shop proved to be a prosperous venture, and on December 20, 1946, the applicant served a notice on the respondent under s. 5, sub-s. 1 of the Landlord and Tenant Act, 1927 (1), requiring a new lease.

During the currency of the lease the respondent had greatly extended his business, so that by the time the applicant served her notice requiring a new lease, he had five partners and a staff of forty-one, and in consequence he and his partners had great need for less cramped head offices premises and in particular for the full use of the ground floor on street level, as essential to convenience of office work, the interviewing of clients, and the display of notices. The respondent accordingly refused a new lease and negotiations having broken down he served a notice to quit on the applicant, who thereupon issued an originating application alleging a right under s. 4 of the Act to compensation for loss of goodwill, which she valued at 1,500*l.*

---

(1) Landlord and Tenant Act, 1927, s. 4: "The tenant of a "holding to which this Part of this "Act applies shall, if a claim for "the purpose is made in the pre"scribed manner (i.) in the case "of a tenancy terminated by "notice, within one month after "the service of the notice on the "tenant, and (ii.) in any other "case, not more than thirty-six "nor less than twelve months "before the termination of the "tenancy; be entitled, at the "termination of the tenancy on "quitting the holding, to be paid "by his landlord compensation "for goodwill if he proves to the "satisfaction of the tribunal that "by reason of the carrying on by

The application came before Judge A. H. Armstrong at the county court at Yeovil on June 12, 1947, when he decided as a preliminary point of law that as the respondent intended to grant a lease of the premises to his firm it could not be said that he required the premises for his own occupation, within the meaning of s. 5, sub-s. 3 (*b*). The case was then referred to a referee, who reported in favour of the applicant, holding, that she had established her right to goodwill under s. 4, the value of which he fixed at 1,200*l.* ; that the compensation payable under s. 4 would not compensate her for her loss if

" him or his predecessors in title " at the premises of a trade or " business for a period of not " less than five years goodwill " has become attached to the " premises by reason whereof the " premises could be let at a higher " rent than they would have " realized had no such goodwill " attached thereto."

Section 5, sub-s. 1 : " Where " the tenant alleges that, though " he would be entitled to compensation under the last foregoing section, the sum which " could be awarded to him under " that section would not compensate him for the loss of goodwill " he will suffer if he removes to " and carries on his trade or " business in other premises, he " may in lieu of claiming such " compensation, at any time within " the period allowed for making a " claim under the said section, " serve on the landlord notice " requiring a new lease of the " premises at which the trade or " business is carried on to be " granted to him."

Sub-section 3 : " Where the " tenant is the applicant the grant " of a new lease under this section " shall not be deemed to be reasonable — (*a*) unless the tenant " proves . . . . . that he would " be entitled to compensation " under the foregoing section, " but that the sum which could " be awarded to him under that " section would not compensate " him for the loss he would suffer " if he removed to and carried " on his trade or business in other " premises or (*b*) if the landlord " proves—(i.) that the premises " are required for occupation by " himself, or, where the landlord " is an individual, for occupation " by a son or daughter of his over " eighteen years of age ; or " (iv.) that for any other reason " the grant of such a lease of the " premises would not be consistent " with good estate management " . . . ."

she removed her business to other premises; and that the grant of a new lease to her would not be unreasonable or inconsistent with good estate management. The learned county court judge affirmed the referee's report and granted the applicant a new lease for seven years. The respondent landlord appealed.

Holroyd Pearce K.C. and *Dare* for landlord. The tenant has to satisfy the tribunal that there is an adherent goodwill enuring for the benefit of the landlord when he comes into possession, and also as to the value of that goodwill, before any question of a new lease under s. 5 can arise, for by the opening words of sub-s. 1 of that section: "Where the tenant alleges "that, though he would be entitled to compensation" under s. 4, the "sum which could be awarded to him under that "section would not compensate him for the loss of goodwill "he will suffer, if he removes to and carries on his business in "other premises. The tribunal below has confused profit with adherent goodwill and has also included the profit arising from the bakery leased from another landlord. There is no evidence of adherent goodwill but merely of saleable goodwill: [*Whiteman Smith Motor Co.* v. *Chaplin* (1) and *Charrington* v. *Simpson* (2) referred to.] The Act of 1927 interferes with freedom of contract and therefore in case of ambiguity the court should lean against such interference: *Morell & Sons* v. *Canter* (3).

Sub-section 3 (*b*) of s. 5 does not say that the landlord shall require the premises for his "sole" occupation. If that had been the intention of Parliament it could have said so. Presumably it had no such intention and it would be wrong to cut down a provision inserted as a safeguard for the landlord. If the landlord's firm is granted by lease or licence the use of the ground floor the landlord will be in occupation. The partnership will hold as joint tenants in law in trust for the partners who are tenants in common. Joint tenants and tenants in common each have a right of occupation over the whole: see Cheshire's Modern Real Property, pp. 550 and 554. The tribunal below has fallen into the common error of regarding a firm as a different entity from the individuals who compose it. Dictum of Farwell L.J. in *Sadler* v. *Whiteman* (4) referred to. The granting of a new lease would in the circumstances of this case be inconsistent with good estate management.

---

(1) [1934] 2 K. B. 35, 55.

(2) [1935] A. C. 325.

(3) [1947] W. N. 264; [1947] 2 All E. R. 533, 555.

(4) [1910] 1 K. B. 868, 889.

G. R. F. Morris and *E. B. McLellan* for the tenant. The application here was under s. 5 and the proceedings were solely directed for the acquisition by the tenant of a new lease. It was implicit in the proceedings that the compensation was inadequate and it has not been suggested that any sum awarded under the Act would compensate the applicant for the loss of her business. No doubt she had to prove that there was some adherent goodwill and this condition precedent was established conclusively. In *Whiteman Smith Motor Co.* v. *Chaplin* (1) Maugham L.J. said that the sum assessed for adherent goodwill can never be more than a guess. If an estate agent quantifies the total goodwill value spread over fifteen years, that will represent the maximum. There must be the requisite deductions for site value and other extraneous matters. The phrase "adherent goodwill" has been used. At every step there must be guess work; there can, of necessity, be no precision. The referee used the known average profits, the type of person frequenting the business premises, and his own knowledge of the neighbourhood. The language of s. 5, sub-s. 3 (*b*) (i.) should not be extended beyond the words actually used. No trace can be found in any reported case of the view that possession should be granted to a landlord who wants occupation for a firm of which he is a member. In *Nuthall* (1917), *Ld.* v. *Entertainments, Ld.* (2), Hallett J. held, where the landlord wanting possession was a company, that only the person entitled to the legal possession of the property at the cessation of the tenancy was the "landlord" and could grant a new lease. Parliament could not have intended to throw a mantle over firms, having regard to the language of the section. If it had been intended to embrace "a firm" that intention could have been made quite clear. The owner cannot be said to "occupy" the premises if he occupies merely as a partner of a firm or a member of an incorporate association. A person cannot be landlord and co-tenant with his partners at the same time. It would defeat the purpose of the Act if a landlord can say that he wants the premises for himself and then, having obtained possession, leases the premises to someone else. There should be no apportionment between the bakehouse and the café for the purpose of assessing the goodwill.

(1) [1934] 2 K. B. 36.

(2) [1947] 2 All E. R. 384.

[SCOTT L.J. There is evidence that separate profits were made in the bakehouse.]

The bakehouse is a source of profit but the profit is made in the café. It matters not from where a business gets its supplies. The bakehouse is merely an adjunct of the café and used to supply the café with confections for sale. The grant of a new lease to the tenant would be quite consistent with good estate management, because whereas in past years other businesses have gone down this café, catering for public needs has prospered. The test ought to be quite apart from the convenience of a fairly elderly partner of a firm.

Holroyd Pearce K.C. in reply. Requiring the premises for his (the landlord's) own use means "reasonably needed." It is better estate management if the whole of the premises are in one occupation. The interests of the landlord as an estate agent must also be taken into consideration. The Act of 1927 is a business man's Act, and is not contemplating technicalities. It is the need of the landlord that is relevant and not the steps—whether by lease or licence—by which the conveyance may be carried out.

Cur. adv. vult.

June 1. SCOTT L.J., delivering the judgment of the court, stated the facts and having referred to the sections of the Landlord and Tenant Act, 1927, under which the proceedings were brought, continued:

The appeal turns almost entirely on the correct interpretation of the Act. In our view, both the referee and the judge misinterpreted and misapplied it, in spite of clear guidance from reported cases. Of these the most illuminating is that of *Whiteman Smith Motor Co.* v. *Chaplin* (1), in which the relevant provisions of the Act were analysed by Scrutton L.J. and Maugham L.J. sitting as a Divisional Court of the King's Bench Division. Those learned judges made it quite clear that the only part of the tenant's goodwill which is the subject of compensation is the net rental value of what "adheres" to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value, after the premises have returned into his possession. That proposition was quite definitely approved in the House of Lords in the case of *Charrington* v. *Simpson* (2), by Lord Tomlin: "It may

(1) [1934] 2 K. B. 36.

(2) [1935] A. C. 324, 335, 336, 344.

"indeed be doubted whether the term goodwill in its strict "sense is appropriate to be introduced into a case where "some improvement of rental value has resulted to the land-"lord from the carrying on of a business on the premises by a "previous tenant. It is unfortunate that the section has not "been framed with a clearer exposition of its general purpose "and with more precision in the use of terms. The section, "however, seems to contemplate that in certain cases something "in the form of increased value will, after the termination of "the tenancy and as the result of the tenant's business activities "during his tenancy, adhere to the premises in the landlord's "hands, but that the measure of any compensation to the "tenant in respect of it is not what he loses but what the "landlord gains." That view is repeated in different words by Lord Macmillan: "An incoming tenant may well make pay-"ment to an outgoing tenant in respect of the goodwill as he "finds it, however arising, but the landlord is not under the "Act a purchaser of the goodwill as it stands; he has to pay "statutory compensation to the outgoing tenant in respect of "something which the tenant has himself directly created and "which he leaves behind in the shape of an added letting value "in the premises. The task of discrimination among the "elements contributing to added value may be difficult, but "the statute has imposed it."

Both referee and learned judge in the present case misconceived altogether the nature and limitations of the "adherent" goodwill—the only subject of compensation under s. 4. They both held such erroneous views about the Act that in order to prevent misunderstanding in the future we think it may be useful to call attention to certain features and aspects of the legislation not expressly emphasized in *Whiteman's* case (1). (1.) The Act interferes with freedom of contract and thus modifies an important right of the individual. Any real ambiguity of language in any particular provision, still apparent even when construed in the light of the whole Act, ought to be resolved in favour of maintaining common law rights. (2.) For the same reason its plain meaning should not be strained in favour of any pre-supposed intention to enlarge the tenant's or to cut down the landlord's contractual rights. (3.) For this purpose the long title of the Act is significant. It limits the scope of the Act to premises "used for "business purposes," and treats "improvements" and

(1) [1934] 2 K. B. 36.

"goodwill" as strictly parallel subjects for compensation. (4.) That parallelism is worked out in the two sections which create the right to compensation. Firstly, s. 1 deals with improvements, and s. 4 with goodwill; and in each section the operative words of the first sub-section down to the word "compensation" are identical. Secondly, the restriction of compensation by s. 1, proviso (*a*), to "such net addition to the "value of the holding, as may directly result from the improve-"ment," finds its counterpart in sub-s. 1 of s. 2 in the limitation of compensation to the added rental value of the premises in the hands of the landlord as a result of business previously carried on there by the tenant, coupled with its proviso (*a*), that the addition must be proved to be "the direct result of "the carrying on of the trade or business" by the tenant. Thirdly, the condition imposed by s. 1, sub-s. 2, that in determining the amount of net rental value added by the improvements regard shall be had to a change of user of the premises intended by the landlord, finds its counterpart in s. 4, in proviso (*a*) to sub-s. 1, that the tribunal shall have regard in assessing the net added goodwill to a proved "intention" to "use the "premises for a different and more profitable purpose"—the "more profitable" being defined in sub-s. 2 as measured by increase in rental value.

The further condition imposed by s. 4, sub-s. 1, proviso (*d*) (ii.), that any part of such added value attributable exclusively to the situation of the premises shall be disregarded, obviously can have no prototype in the provision about improvements, but reinforces the principle which governs both sections, that the landlord shall not be called on to pay for any value in his hands, when possession passes to him, which is not solely and directly attributable to the efforts of the tenant. Finally, the same procedure is adopted for the assessment of both heads of compensation: see s. 21, s. 1, sub-s. 3 and s. 4, sub-s. 4.

Close and detailed consideration of the conditions imposed on the right to compensation under s. 4 is essential because the right, conferred on the tenant by s. 5 to claim a new lease, is itself thereby made expressly conditional on an "allegation" by him, first, that he is entitled to compensation under s. 4 and, secondly, that that measure of compensation will not compensate him for the loss of his goodwill—meaning, of course, the whole of the tenant's goodwill, not merely that part of it for which s. 4 confers compensation. The whole of the rights conferred on the tenant by s. 5 to apply for a new lease, and of the corresponding duty imposed on the landlord to grant it, are expressed in studiously cautious and limited language. It follows from what we have already said that the first ground for allowing the appeal is that there was no evidence before the referee or judge of compliance with the primary condition of the right under s. 4 to compensation for adherent goodwill, as defined in the decisions we have quoted. But there are three or four other grounds also which are equally cogent. The jurisdiction to order a new lease under s. 5, sub-s. 2, is discretionary, but the exercise of that power is conditional on the tribunal considering that " in all the circum-" stances " the grant is " reasonable," and in our opinion there was no evidence to justify the tribunal in taking any such view. Sub-section 3 enacts that such a grant shall not be deemed to be reasonable, (*a*) unless the tenant proves three facts; or (*b*) if the landlord proves any one of four other facts. Under (*a*) there was thus an onus of positive proof on the tenant; and as we have already said he must prove the central fact, namely, his right to compensation. Under (*b*) the landlord did prove two of his four conditions of exemption, namely (i.) that he " required the premises for his own occupation " and (ii.) under para. (iv.) that " the grant of such a lease of the premises would " not be consistent with good estate management."

The facts proved by him as regards exemption No. (i.) are these. The existing arrangement with his partners as to the firm's occupation of the building (excluding the tea-shop) was that the firm as a whole had a tenancy from him as landlord and he assumed that a similar arrangement would be made in regard to the premises previously let for a tea-shop. On this Mr. Morris for the tenant contended that such a lease would not constitute " occupation by the landlord " within the meaning of cond. (i.) to be proved by the landlord. Mr. Holroyd Pearce's answer was that it was open to the landlord to give a mere licence to the firm to use the new premises; which would dispose of that objection. We agree; but we go further. On the reasonable interpretation of the Act it would be ridiculous to suppose that Parliament had intended to complicate the simple business conception of occupation by the landlord by pursuing the irrelevant further inquiry whether he had a partner or partners, or whether he let the premises in question to the firm or gave them a licence. But even if so artificial and technical a construction of the Act as that urged by

Mr. Morris was proper, Mr. Pearce pointed out that on the basis of the position now obtaining both in equity and at law, as explained with authorities on pp. 550 and 554 of the fifth edition of Cheshire's "Modern Real Property," land or any interest in land owned by a partnership and in its possession is occupied by all the partners and by each of them, because they are tenants in common. That, in our view, disposes of Mr. Morris' contention of real property law. In addition, Mr. Holroyd Pearce argued that had Parliament intended to limit the word "occupation" to the *sole* occupation of the landlord and to exclude occupation by him as a partner it could have inserted the word "solely." As Mr. Dare pointed out, this was done in the Customs and Inland Revenue Act, 1878, s. 13, sub-s. 1.

There remains the answer of para. (iv.) to the claim for a lease, namely, that "it would be inconsistent with good estate "management." On this there was overwhelming evidence that the firm needed the tea-shop premises for the proper expansion of their headquarter premises, and for display of posters, etc., and we cannot imagine a clearer case of bad estate management than a decision by the senior partner to throw away the opportunity given him by the expiration of the tea-shop lease to bring that part of the premises within the firm's business occupation.

It will be observed that the notice of a claim for a new lease has to be served within the same limits of time as the notice of a claim under s. 4, namely, not earlier than three years but not later than one year before the date of expiry of the lease, and the right is conferred as an alternative to the right to compensation, and the tenant is only called upon to *allege* a right to compensation; but by sub-s. 2 the tenant is given a further period of three months' grace after the expiration of his time for serving notice of claim for compensation, within which he may apply to the court for a new lease: and by the same sub-section the tenant is given the right, in the event of his failing to get a new lease by reason of the limitations upon the jurisdiction to order a new lease imposed by sub-s. 3, to ask the tribunal to give him compensation under s. 4. There is in s. 5, sub-s. 2, another echo of s. 4. In the case of the right to a new lease being excluded by reason of one or other of the provisions of s. 5, sub-s. 3 (*b*) (grounds to be proved by the landlord for refusing a lease) compensation is authorized by s. 5, sub-s. 2, but from its quantum must be deducted any element of site goodwill, thus repeating s. 4, sub-s. 1, proviso (*d*) (ii.).

Sections 4 and 5 would seem, in the light of the preceding analysis of certain aspects of them, to provide for the determination by the tribunal of claims under both sections *before* the termination of the relationship of landlord and tenant, with the intention that the claim for compensation under s. 4, the claim for a new lease under s. 5 and the alternative claim for compensation under s. 5 should all be threshed out on a prophetic basis. We only call attention to this doubtful point of interpretation because this court in *Butlins, Ld.* v. *Fytch* (1), discussed a closely allied doubt although it was not necessary to decide the point, and we recognize there is much to be said for the exposition by Talbot J. in *Smith* v. *Metropolitan Properties, Ld.* (2), which treats the meaning of s. 4 as not open to doubt.

The chief mistake made by both the referee and the judge in their consideration of the net adherent goodwill was their total failure to realize the difference between the global goodwill which the landlord, if able to give vacant possession with long enough tenure, could have sold in the open market to any purchaser in the same trade or business who wanted the site, and the very limited adherent goodwill which might have been of value to the landlord, and alone is within s. 4. That mistake vitiates the whole of the referee's reasoning in his report. Nor was there any attempt made in the evidence given on behalf of the tenant to eliminate any one of those elements of goodwill which were capable of enuring to the benefit of a purchaser in the same line of business as the tenant, but incapable of enuring to the landlord's benefit. Neither site value; nor the "personal" goodwill attaching to the way in which, and the type of staff with which, the tenant had managed the tea-shop; nor the goodwill value of her separate bakery rented from another landlord was deducted, although they were all possible (though by no means certain) items of value in the tenant's goodwill, which could not have enured to the benefit of the landlord. In addition, both referee and judge confused profits with goodwill, wholly ignoring the clear warning given by Maugham L.J. in *Whiteman Smith Motor Co.* v. *Chaplin* (3).

There is one final point we would add, namely, that if it was obviously so much to the interest of the firm's business to use the ground floor for its own purposes, there cannot be any doubt about that floor carrying a rental value for that purpose which ought to be treated by the court as satisfying the criterion of the phrase " used for a different and more profitable purpose" in proviso (*a*) of s. 4, sub-s. 1, as further defined by s. 4, sub-s. 2 ; for we are satisfied that the economic rent which the landlord, if he is to be regarded as separate from his firm, could obtain for the ground floor for the purpose of his firm's business would be far more than the rent which could be obtained for the premises if used for the purpose of a tea-shop. The referee's calculations of the rent obtainable for a tea-shop are fantastically misconceived, and we do not propose to discuss them.

---

(1) [1948] 1 All E. R. 737.

(2) [1932] 1 K. B. 314.

(3) [1934] 2 K. B. 50, 51.

In the result we are satisfied that there is no adherent goodwill in the present case and that the report and judgment below must both be set aside and the application alike for a new lease, or alternatively for compensation, refused. The landlord will have the costs here and below.

Appeal allowed.

Solicitors for respondent (landlord): *Reed & Reed, for Clarke, Willmott & Clarke, Taunton.*

Solicitors for applicant (tenant): *Markham Thorp & Co., for Farnfield and Nicholls, Gillingham, Dorset.*

A. W. G.

BETTELEY ADDYMAN AND JALLAND LIMITED *v.* SINGER.

1948
May 26

Lord Goddard C.J., Birkett and Streatfeild JJ.

Criminal law—Controlled prices—Sales by manufacturers of clothing goods at prices in excess of maximum prices fixed by statutory direction —Provision by statutory regulation for imposing minimum penalty— Minimum penalty such amount as will secure that offender derives no benefit from offence—Whether in ascertaining minimum penalty taxes charged on excess amount derived from illegal sales may be deducted—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 55AB—*The Apparel and Textiles Order,* 1942 (*St. R. & O.* 1942, *No.* 1000), *art.* 1—*The Utility Apparel* (*Infants'*

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

1948

BETTELEY ADDYMAN AND JALLAND LD. *v.* SINGER.

and Girls' Wear) (*Consolidation*) *Directions* 1945 (*St. R. & O.* 1945, *No.* 1092), *para.* 3 (2).

Paragraphs 3 and 4 of reg. 55AB of the Defence (General) Regulations, 1939, provide for the imposition of maximum and minimum penalties for any offence committed in contravention of a control order made by a competent authority. By para. 4 it is provided that " (*a*) . . . . the minimum amount shall be such " amount as will in the opinion of the court secure that the offender " derives no benefit from the offence." A company of clothing manufacturers during a year of their trading charged an excess of 3,789*l.* over the aggregate maximum prices which they were entitled to charge. The justices decided to impose the minimum penalty prescribed by para. 3 and defined by para. 4 of reg. 55AB and they imposed the penalty of 3,789*l.*, namely the full amount of the excess. It was proved that the company had paid an aggregate sum of 3,293*l.* in respect of income tax and excess profits tax due to be paid on the excess sum of 3,789*l.*

Held, that the proper meaning to be given to para. 4 was that the offender should be left no better nor worse off than if he had made no illegal profit. It was, therefore, in accordance with that meaning that the minimum penalty ought to have been merely the sum of 496*l.* namely, the sum by which the company had actually benefited after having paid the respective taxes with which they had been charged.

CASE STATED by the justices of the City of Nottingham.

The appellant company, clothing manufacturers, were charged before the justices under art. 1 of the Apparel and Textiles Order, 1942, para. 3 (2.) of The Utility Apparel (Infants' and Girls' Wear) (Consolidation) Directions, 1945, as amended ; and reg. 55AB of the Defence (General) Regulations, 1939, that they in or about December, 1946, in the course of their business charged in respect of all the relevant goods supplied by sale during the period twelve months ended on December 19, 1946, 33,353*l.* 5*s.* 2*d.*, being an aggregate of gross prices which exceeded by the sum of 3,789*l.* the manufacturers' costs of production and other costs and five per cent. thereof, such costs and percentage thereof constituting the aggregate controlled prices fixed by para. 3 (2.) of the 1945 Directions.

Paragraphs 3 and 4 of reg. 55AB of the Defence (General) Regulations, 1939 (1) provide for the imposition of maximum and minimum fines. It was submitted before the justices on behalf of the appellants as follows: (1.) The special circumstances referred to in para. 3 applied and no penalty should be imposed; (2.) alternatively only the minimum penalty should be imposed; (3.) in view of the fact that para. 4 provided that the minimum amount should be such that the offender derived no benefit from the offence, the proper minimum amount was the amount by which the respective prices at which the goods were sold exceeded the respective controlled prices but less the amount of income tax and excess profits tax which had been paid upon such difference; (4.) the agreed amount of the excess was 3,789*l.* and the agreed amount of income and excess profits tax thereon was 3,293*l.*, so that the balance 496*l.* was the sum by which the appellants had benefited, and was the appropriate minimum fine.

---

(1) Defence (General) Regulations, 1939, reg. 55AB : " (3) Any " person guilty of an offence " against this regulation shall be " liable—(*a*) on summary conviction, to a fine not exceeding the " maximum amount provided in " the next following paragraph " . . . . and shall in every case be " ordered to pay such a fine as " aforesaid of an amount not less " than the minimum amount pro-

The justices decided as follows: (1.) there were no special circumstances within the meaning of para. 3; (2.) the minimum penalty as defined by para. 4 should be imposed; (3.) they had no power to take into consideration the amount of the income tax and excess profits tax which had been paid; (4.) the proper amount of the minimum penalty was the said excess sum of 3,789*l.*

The appellants appealed against such part of the justice's order as directed that the minimum penalty should be the sum of 3,789*l.*

R. C. Vaughan K.C. and *Geoffrey Lane* for the appellants. The appellants say that the actual benefit they have received is only 496*l.* The justices, however, although they decided to

"vided in the next following "paragraph, unless having regard "to any special circumstances the "court thinks that there is good "reason for not imposing a fine or "for imposing a fine of less "amount. (4) The minimum and "maximum amount of the fine "referred to in the last foregoing "paragraph shall be as follows, "that is to say (*a*) whether on "summary conviction or convic-"tion on indictment the minimum "amount shall be such an amount "as will in the opinion of the court "secure that the offender derives "no benefit from the offence; "(*b*) on summary conviction the "maximum amount shall be an "amount which exceeds the mini-"mum amount by five hundred "pounds, or by the treble penalty, "whichever is the greater . . . . "and for the purposes of this "paragraph the expression "'treble penalty' means—(1) in "a case where the offence was a "sale of . . . . controlled goods "at too high a price, an amount "equal to three times that price; ". . . ."

impose only the minimum penalty as defined by para. 4 of reg. 55AB had nevertheless come to the conclusion that they had no power to deduct anything in respect of taxes from the amount of the excess. By the income tax law as laid down in the case of *Inland Revenue Commissioners* v. *von Glehn & Co.* (1) a penalty inflicted for a breach of the law cannot be deducted in computing the profits of a business for income tax purposes. It is also the income tax law as laid down in *Mann* v. *Nash* (2) that a trader is liable to tax upon all the profits of his trade whether any part of them was acquired legally or illegally. Therefore the appellants have had to pay the whole of the income tax and excess profits tax upon this excess amount and they have been unable to claim anything in respect of the penalty which will have been inflicted upon them because of these sales above the maximum prices. Therefore as the total amount of the tax was 3,293*l.*, the justices by inflicting the penalty of 3,789*l.* upon the appellants have imposed a penalty exceeding by the sum of 3,293*l.* the actual benefit which the appellants acquired by the transactions, that actual benefit being 496*l.* Paragraph 4 of the regulations merely requires that the offender shall not benefit from the offence. What the justices have done is really to have caused a loss of 3,293*l.* to the appellants. The legislature never intended that the minimum penalty should be inflicted in that way. What was intended was that the infliction of this minimum penalty as opposed to the maximum penalty was to render the offender no better nor worse off than he was before the commission of the offence. The appellants are now worse off to the extent of 3,293*l.*

H. L. Parker for the respondent, the informant. Every conceivable breach of a price control order is connected with this question. It is the first time that this point has been taken. If the appeal is allowed the result will lead to very great practical difficulties. In these days most people are taxpayers in some form or another. In this case it appears that the appellants were charged with selling goods over the period of a year but by the time that they were prosecuted the respective taxes had already been paid. Every case however is not so simple as this one. Take the case of a milkman who sells milk at a price in excess of the maximum price at which he is allowed to sell. If the principle for which the appellants

(1) [1920] 2 K. B. 553. (2) [1932] 1 K. B. 752.

contend becomes a principle of the law it would be extremely difficult if not impossible to say what should be the correct minimum penalty in such a case. Take the case of excess profits. Unlike this case the case for the prosecution may be instituted two or three years before the excess profit for the chargeable accounting period has been assessed. It is difficult to see how in such a case this principle could be applied. The principle suggested by the appellants is based on the net profit derived by the offender. The word " profit " however is not mentioned in the regulation. Therefore I submit that it was not intended by the legislature that the benefit derived by the offender should be based on profit.

LORD GODDARD C.J.: Under the regulation it is provided by para. 3 that: " Any person guilty of an offence against " this regulation shall be liable, on summary conviction, to " a fine not exceeding the maximum amount provided in the " next following paragraph . . . . and shall in every case " be ordered to pay such a fine as aforesaid, of an amount " not less than the minimum amount provided in the next " following paragraph, unless, having regard to any special " circumstances, the court thinks there is good reason for " not imposing a fine or for imposing a fine of less amount." No special circumstances were found here, and there is no appeal from that. Then follows this important provision contained in para. 4: " The minimum and maximum " amount of the fine referred to in the last foregoing paragraph " shall be as follows, that is to say, whether on summary con- " viction or on conviction on indictment, the minimum amount " shall be such amount "—observe those words—" as will, " in the opinion of the court, secure that the offender derives " no benefit from the offence." When we turn to the maximum amount, observe the difference in the language. " (*b*) On " summary conviction the maximum amount shall be an " amount which exceeds the minimum amount by five hundred " pounds or by the treble penalty, whichever is the greater "— and the same on conviction on indictment, except that for 500*l.* there is substituted 5,000*l.*—" and for the purposes of " this paragraph the expression 'treble penalty' means: " (i.) in a case where the offence was a sale of, or an offer or " agreement to buy or sell, or an invitation of an offer to buy " or sell, controlled goods at too high a price, an amount " equal to three times that price." Therefore, with regard to the maximum penalty, which is meant to be a highly punitive penalty, being imposed in what I may call a bad case of deliberate overcharging, there is no question. It is fixed to the extent of the treble penalty; it simply is that you find the price and multiply it by three. Observe the difference between that provision and the provision with regard to the minimum price, which is to be "such amount as will, in the opinion of "the court, secure that the offender derives no benefit from "the offence." It seems to me that that minimum fine clearly indicates that what Parliament means is that the person is to pay a sum of money which will leave him no better off than if he had not got the illegal profit into his pocket. He is to be left in the same position; no better and no worse off than he would have been if he had not offended against the order. Of course, that may be, in many cases, difficult of assessment, and the words "in the opinion of the court" show, as it seems to me, that Parliament is leaving it to the court to use the best means that it can in coming to a decision as to what is the proper amount. It is not an amount necessarily measured by some particular yardstick. The court must do the best it can. On the other hand, there may be cases (and it is said this is one, because the time when the prosecution is brought happens to be after the assessment for taxes has been ascertained) in which the court will not have any difficulty in applying a measurement because it has already been done for them. Now if I am right in the view which I have taken that the intention of the section is that the person is being fined such an amount as will leave him in the same position as he would have been in if he had not made the overcharge, the matter becomes, I think, clear, because, in making the overcharge, it is true he is putting into his pocket in the first instance, 3,789*l*., but he has had to take out of that 3,293*l*., and pay that over to the state in the shape of taxation. The justices, therefore, can see at once what sum has to be brought into account to find out whether or not the offender is getting a benefit. In such cases, as Mr. Parker for the respondent has indicated to us, where the offender may be prosecuted for a similar offence, such as the milkman overcharging in respect of two or three days' milk supply, it might be quite difficult to ascertain what is the amount of benefit that he has received by so doing—by "benefit" I mean "net benefit"—but the court has got to fix a sum which, in the opinion of the court, would fairly represent the benefit he had got. It is not at all unlike the duty which the court has so constantly to perform in assessing damages which are at large and cannot be measured by any of the well-known and recognized rules for assessing damages, either in contract or tort. The court has to make the best estimate it can. Sometimes it happens that you have got measurement at hand. If you take the ordinary case—which is the most common class of case before the court—of damages arising out of a collision, if the action is brought merely in respect of the damage done to the vehicle, there is, as a rule, no difficulty in ascertaining the amount of the loss the owner of the vehicle has sustained, because it is the cost of repairs plus the amount he may have had to spend in the hire of a vehicle whilst his own vehicle is being mended. On the other hand, where it is a question of personal injuries and a man has lost a limb or suffered other injuries which have laid him off work and which may lay him off work in the future for an indefinite period, the court has no measurement at hand to measure that amount, but makes the best estimate that it can.

In this case, it seems to me that the statute clearly requires the justices to measure the benefit which the offender has received by his illegal profit and to take that sum from him by way of a minimum fine. Therefore, in my opinion, the justices were in error in thinking that they had not got the right to take into account the tax which he had to pay, and they ought to have ascertained as well as they could—and in this case there was no difficulty—what the net amount of the benefit was that this offender received. Otherwise, if Parliament had meant that the offender was, in every case, to pay up the full amount of the benefit—by "benefit" I mean the illegal profit—it would have been quite easy to say so. When I compare the provision for the minimum penalty with the words used in regard to the maximum penalty, it seems to me quite clear that the legislature only intended that an offender who in the opinion of the justices should only be fined the minimum penalty, should only pay that by which he was in fact better off.

Therefore, I think that in this case, there was ample evidence before the justices to show that the true amount by which these appellants were better off was the sum of 496*l.*, and that that was the only benefit which they received. Therefore, this case will go back to the justices with an intimation that they had power to take the taxes into account and the proper penalty for them to impose in this case was 496*l.*, and the conviction must be amended accordingly.

BIRKETT J.: I am of the same opinion and for the same reasons. I would base my own judgment on the concluding sentence of my Lord's judgment about the true duty which lay upon the justices in this case. No doubt, as Mr. Parker for the respondent has forcibly pointed out, this is an important case, and he has shown some of the difficulties which may arise in dealing with it, but in the present case I think the facts are quite clear. The justices found as a fact that there was an agreed figure of 3,789*l.* which was the illegal excess contrary to the provisions of the Trading Order. They also found that the appellants had suffered by way of taxation the agreed sum of 3,293*l.*, leaving the sum of 496*l.* I think that where the justices here went wrong was in saying that they had no power to consider that second figure at all. That seems to me to ignore entirely the meaning of the words " in the opinion of the court." The words of the regulation are: " the minimum amount shall " be such amount as will, in the opinion of the court, secure that " the offender derives no benefit from the offence." Now the justices had before them, I think, the clearest evidence that the amount which the appellants suffered by way of income tax and excess profits tax was 3,293*l.*, and the clearest evidence that the cash benefit, at least, will still remain the sum of 496*l.* They say in the case stated: " We are of opinion that " we had no power to deduct that sum." I think that they had that power. I think that on the true construction of the words of the regulation they ought to have taken into consideration the fact that the appellants had suffered this deduction by way of taxation. For these reasons I am of the same opinion as that expressed in the judgment of my Lord.

STREATFEILD J. I am of the same opinion. I appreciate that this is a matter of considerable importance, as Mr. Parker pointed out.

It is clear from the two cases which have been cited to the court, *Inland Revenue Commissioners* v. *von Glehn & Co., Ld.* (1) and *Mann* v. *Nash* (2) that, whatever the result of a fine in this case, no part of the amount of the income tax and excess profits tax which has been paid can be recovered by the appellants from the Revenue. In my opinion, the

---

(1) [1920] 2 K. B. 552.

(2) [1932] 1 K. B. 752.

1948

BETTELEY ADDYMAN AND JALLAND LD. *v.* SINGER.

Streatfeild J.

justices here have wrongly fettered themselves by saying that in assessing the minimum amount under the regulation they had no power to take into consideration the amount of tax which has been suffered and which is irrecoverable. I agree with my Lord that in assessing the amount which "in the "opinion of the court shall secure that the offender derives no "benefit from the offence," it is impossible to shut out the tax which has been suffered by the appellants in this case. I say nothing as to what might be the position in other cases, but it seems to me to be clear on the facts of this case, as stated, that before assessing the minimum penalty the court had to arrive at an amount which would, in its opinion, secure that there was no benefit to the offender. I do not, for myself, see how that could be done unless the justices took into consideration what had been paid by way of income tax and excess profits tax by the offender.

Under these circumstances, I agree that this case should be sent back with the directions my Lord has indicated.

Appeal allowed.

Solicitors for the appellants: *Kenneth Brown, Baker, Baker, for Browne, Jacobson & Hallam, Nottingham.*

Solicitor for the respondent: *Solicitor, Board of Trade.*

---

pplied. R. *v.* FULHAM, HAMMER-
MITH AND KENSINGTON RENT
RIBUNAL. *Ex p.* MARKS. [1951]
All E.R. 465.

REX *v.* PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.

Ex parte BEDROCK INVESTMENTS LIMITED.

C. A.

1948

June 22, 23, 24; *July* 16.

Scott and Asquith L.JJ. and Romer J.

Landlord and tenant—Furnished houses rent control—Jurisdiction of rent tribunals—Houses controlled by Rent Restriction Acts—No power to reduce rent below standard rent—Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 7.

Where a dwelling-house to which the Rent Restriction Acts apply is let under a contract which also brings the premises within the Furnished Houses (Rent Control) Act, 1946, a rent tribunal under that Act has no jurisdiction to reduce the rent of the premises below the standard rent, since to do so would "affect" provisions of the Rent and Mortgage Interests Restrictions Acts,

C. A.

1948

REX v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL. *Ex parte* BEDROCK INVESTMENTS, LD.

1920-1939, contrary to the provisions contained in s. 7 of the Furnished Houses (Rent Control) Act, 1946.

Judgment of Divisional Court [1947] K. B. 984, affirmed.

APPEAL from the Divisional Court.

The respondents, Bedrock Investments, Ld., were the owners of premises in No. 6 Craven Hill Gardens, London, W.2, which were divided into flats and rooms let on leases to various tenants. All the lettings were first lettings and the premises were, accordingly, "new control" premises and were controlled by the Rent and Mortgage Interest (Restrictions) Act, 1939, with the result that the contractual rents were the standard rents for the purposes of the Rent Restriction Acts. All the rooms and flats were let unfurnished but certain specified services were provided by the lessors, and it was conceded that the premises fell within the provisions of the Furnished Houses (Rent Control) Act, 1946, as well as within the general provisions of the Rent and Mortgage Interest Restrictions Acts, 1920–1939. The tenants of some of the flats applied to the tribunal appointed for the district under the Act of 1946 for the reduction of their rents and on March 7, 1947, the tribunal made orders reducing the rents to figures below the respective standard rents. The respondents thereupon applied to the Divisional Court for orders of certiorari to bring up the orders of the tribunal to be quashed on the ground that the tribunal had no power to make the orders by reason of the provisions of s. 7 of the Furnished Houses (Rent Control) Act, 1946 (1). The Divisional Court held that the tribunal had no jurisdiction to reduce the rents below the standard rents of the premises concerned (2). The appellants appealed.

Sir Hartley Shawcross A.-G. and *H. L. Parker* for the appellants.

Gilbert Paull K.C., *P. Lamb* and *D. Purcell* for the respondents.

---

(1) Furnished Houses (Rent Control) Act, 1946, s. 7: "Sections "9 and 10 of the Increase of Rent "and Mortgage Interest (Restrictions) Act, 1920 (which "relate respectively to limitation "on rent of houses let furnished "and to penalty for excessive "charges for furnished lettings), "shall not apply as regards the "rent charged for any house or "part of a house entered in the "register under the provisions of "this Act in respect of any period "subsequent to such registration, "but save as aforesaid nothing in "this Act shall affect any provisions of the Rent and Mortgage "Interest Restrictions Acts, 1920–"1939."

(2) [1947] K. B. 984.

The arguments sufficiently appear from the report of the proceedings in the court below and from the judgment of the Court of Appeal.

Cur. adv. vult.

July 16. The judgment of the Court was read by ROMER J. After dealing with the facts in relation to the various tenancies, it continued : Before considering the arguments which were addressed to us it would be convenient to refer to the relevant provisions of the Furnished Houses (Rent Control) Act, 1946, which received the Royal Assent on March 26 of that year. The Act only operates in districts to which it has been applied by order of the Minister of Health (s. 1, sub-s. 1). Such an order has been made by the Minister in relation to London. Section 1, sub-s. 2, provides for the constitution of a tribunal for each district in which the Act is in force and the provisions of the schedule to the Act are to apply to each such tribunal. A reference to the schedule shows that a tribunal is to consist of a chairman and two other members, all appointed by the Minister, and it may be noted in passing that there is no requirement that the chairman or any member of the tribunal shall have any legal qualifications. Section 2, sub-s. 1, provides that where a contract has, whether before or after the passing of the Act, been entered into whereby one person grants to another person the right to occupy as a residence a house or part of a house situated in a district in which the Act is in force in consideration of a rent which includes payment for the use of furniture or for services, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal of the district, who may thereupon require the lessor by notice to give them certain information. Upon any such reference the tribunal concerned " shall approve the rent payable under " the contract or reduce it to such a sum as they may, in all " the circumstances, think reasonable, or may, if they think " fit in all the circumstances, dismiss the reference, and shall " notify the parties and the local authority of their decision " in each case " (s. 2, sub-s. 1). By s. 2, sub-s. 3, either party or the local authority may refer a case again to the tribunal for reconsideration of the rent fixed by its decision and entered in the reference on the ground of change of circumstances and upon such reference the provisions of sub-s. 2 shall apply subject to the modification that the tribunal shall have power

C. A.

1948

Rex v. Paddington and St. Marylebone Rent Tribunal. *Ex parte* Bedrock Investments, Ld.

to increase the rent payable. Section 2, sub-s. 4, provides that where the rent under a referred contract includes payment for services and the tribunal are of opinion that it would be proper that the rent payable for the premises should include an amount in respect of increase and are also of opinion that in all the circumstances a rent higher than the rent payable under the contract might properly be chargeable for the premises in order to include an amount in respect of such increase, they may approve a rent higher by not more than such amount as they think reasonable in that respect. By sub-s. 5 an approval, reduction or increase under s. 2 may be limited to rent payable in respect of a particular period. We would here observe that the appellants suggest (and we think rightly) that in the case of premises which are within the Acts of 1920 to 1939 a tribunal cannot exercise the powers of increasing rents conferred by sub-ss. 3 and 4 of s. 2 so as to raise the contractual rent above the amount of the standard rent (if any).

Section 3 requires the local authority to prepare and keep up to date a register in which shall be entered certain particulars with regard to any contract under which a rent is payable that has been approved, reduced or increased under s. 2. Where the rent payable for any premises is entered in the register it shall not be lawful to require or receive (*a*) on account of rent for those premises in respect of any period subsequent to the date of such entry (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered, or (*b*) as a condition of the grant, renewal or continuance of a contract to which the Act applies relating to such premises, payment of any fine, premium or other like sum, or any consideration, in addition to the rent (s. 4). Section 5 contains certain provisions for the protection of tenants in the event of notices to quit being served on them after a contract has been referred to a tribunal.

Section 7 is of considerable importance and is in the following terms: "Sections 9 and 10 of the Increase of Rent "and Mortgage Interest (Restrictions) Act 1920 (which relate "respectively to limitation on rent of houses let unfurnished "and to penalty for excessive charges for furnished lettings) "shall not apply as regards the rent charged for any house or "part of a house entered in the register under the provisions "of this Act in respect of any period subsequent to such "registration, but save as aforesaid nothing in this Act shall "affect any provisions of the Rent and Mortgage Interest "(Restrictions) Acts 1920 to 1939."

Section 8 empowers the Minister to make regulations as to the matters therein mentioned. Section 12, sub-s. 1, defines "services" as including attendances, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a house or part of a house, not being a privilege or facility requisite for the purposes of access, cold-water supply or sanitary accommodation. Section 12, sub-s. 2, provides for aggregation in cases where separate sums are payable by a lessee in respect of occupation of the premises, use of furniture and services respectively; and sub-s. 3 excludes from the Act a house or part of a house let at a rent which includes payment in respect of board, provided that the value of such board to the lessee forms a substantial proportion of the whole rent. Section 13 provides that the Act should continue in force until December 31, 1947, but its operation has in fact been extended.

Having regard to the provisions of the Act of 1946 as outlined above, it is clear that certain premises come both within the provisions of this Act and within the provisions of the Rent Restriction Acts, and we agree with what Atkinson J. said upon the point in the court below. "Lettings," said the learned judge, "seem to fall into three classes; there are "lettings in which there is no furniture and no attendance "included; secondly, a letting in which a substantial portion "of the rent is fairly attributable to the use of furniture or to "attendance; thirdly, a letting in which part of the rent not "amounting to a substantial portion is attributable to the "use of furniture or to attendance. As to the first, the Act "of 1946 can have no application; as to the second, the Rent "Restriction Acts can have no application; as to the third, on "the face of it they may be within both Acts," and Atkinson J. then poses the question "Which set of provisions is to "prevail"?

One criticism by the appellants of the decision of the Divisional Court that the Rent Restriction Acts are to prevail, in the sense that a tribunal cannot reduce a contractual rent below the amount of the standard rent, is that it was founded upon the view that a statutory right to the standard rent is conferred upon a lessor by those Acts. Although passages are to be found which might suggest that the court did hold that view, we do not think that the learned judges were in reality intending to convey anything of the kind. As part of his argument Mr. Paull did, indeed, suggest that the view is a sound one and he pointed to (among other provisions) the definition of "recoverable rent" in s. 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. In a loose sense it is not incorrect to say that a lessor is authorized by the Rent Restriction Acts to receive the standard rent, because those Acts impliedly recognize and leave undisturbed his right to exact that rent by contract whilst eliminating his common law right to contract effectively for anything more. Strictly, however, a lessor's right to receive and, if necessary, enforce, payment of the standard rent is in no way conferred by the Acts; it arises, and arises only, out of the contractual relations into which he enters with his tenant. We are, accordingly, unable to accept the argument that a tribunal which reduces a contractual rent below the standard rent is pro tanto depriving the lessor of rent to which he has a statutory right. That, however, is by no means the end of the matter for the question involved is of much wider scope and was, as we think, accurately formulated by Mr. Paull as follows: Does an order of a tribunal under the Act of 1946 reducing the contractual or registered rent below the standard rent of a dwelling-house affect any provision of any Rent Restriction Acts?

The appellants' contention is that this question should be answered in the negative and their argument before us may be summarized as follows: statutory tenancies are outside the scope of the Act of 1946 and the only tenancies with which the tribunals can deal are those which are created by, and depend upon, contract. The Rent Restriction Acts do not operate during the subsistence of a contractual tenancy and accordingly, during the contractual term, no conflict can arise between those Acts on the one hand and any order that may be made by a tribunal under the Act of 1946 on the other. If, therefore, a tribunal reduces a contractual rent below the standard rent but limits the duration of its order to the duration of the contractual term, then that order in no way conflicts with or affects any provision of the Rent Restriction Acts. If, however, the tribunal's order is not so limited and ex facie continues to operate after the contractual tenancy has become a statutory tenancy again no conflict

C. A.

1948

REX
v.
PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.
Ex parte BEDROCK INVESTMENTS, LD.

arises, and for this reason, that on this change occurring the rent which will be properly chargeable thereafter against the statutory tenant will be the standard rent, to which, in view of s. 7 of the Act of 1946, the registered rent must then give way. As to this section the appellants argued that the words "but save as aforesaid nothing in this Act shall affect any "provisions of the Rent and Mortgage Interest Restrictions "Acts, 1920 to 1939" mean that nothing in the Act shall repeal or modify any such provisions excepting only (to a limited extent) ss. 9 and 10 of the Act of 1920. The object of the section was, it is said, to make it clear that, notwithstanding the Act, tenants were not to be deprived of their existing rights (for example, the right of applying to a county court judge) under the Acts of 1920 to 1939.

In our judgment the question involved does in fact depend on the true construction of s. 7 of the Act of 1946; and in particular on the meaning which is to be attributed to the word "affects" as it appears in the section. As to this it is to be borne in mind that complicated and in some ways intricate machinery had been devised through the medium of the Acts of 1920 to 1939 for the purpose of protecting tenants from the actual or potential avarice of landlords. Security from dispossession had also to be achieved, but with this we are not immediately concerned. The legislative provisions which are relevant for present purposes are those which were evolved over a considerable period, by a process of trial and error, with the object of imposing a "ceiling" upon the rent which a landlord could legitimately require his tenants to pay for the occupation of premises that came within the Acts. In our judgment those provisions are included amongst the provisions which are to remain unaffected by the Act of 1946. Mr. Paull argued that some of those provisions are not only affected but are overruled if the tribunals set up under the Act of 1946 purport to reduce the contractual or registered rent of premises which are within the Act to a level below the standard rent. He supported his argument by certain illustrations, to which it is convenient to refer. Firstly, he assumed the case of a house which, on September 1, 1939, was let as a whole at 200*l.* per annum, including rates, the rateable value of the house on April 1, 1939, being 100*l.* Such a house is within the Rent Restriction Acts. The landlord divides the house into three flats, A, B and C. Flat A has no furniture, and no services are provided to the tenant. Flats B

C. A.
1948

Rex v. Paddington and St. Marylebone Rent Tribunal. *Ex parte* Bedrock Investments, Ld.

and C have no furniture but the landlord agrees to supply central heating. The landlord lets each flat at 100*l.* per annum (to include rates) on tenancies which may be determined by a month's notice on either side. The result of this is that each flat is within the Rent Restriction Acts and that flats B and C are also within the Act of 1946. An application is made by the tenants to the appropriate county court for apportionment under s. 12, sub-s. 3, of the Act of 1920. The judge apportions the September, 1939, rent as follows: flat A 70*l.*, flat B 70*l.* flat C 60*l.* Under the express provisions of s. 12, sub-s. 3, this apportionment is "final and conclusive." The tenants of flats B and C then apply to a tribunal under the Act of 1946, which assumes jurisdiction to entertain the applications. On the ground that flat C is a better or more attractive flat than flat B the tribunal reduces the rent of flat B to 50*l.* but confirms the rent of flat C. These rents are then registered. On this sequence of assumptions it seems to us that the provisions of s. 12, sub-s. 1, of the Act of 1920 have been very gravely affected, for the "final and conclusive" apportionment by the county court judge has not only been brought up for review before the tribunal but has been overruled by its decision. It is also to be observed (although this, perhaps, is only a matter for comment) that inasmuch as the rent tribunal has no power to interfere in the matter of flat A the landlord continues to get a higher rent from the tenant of that flat (to whom he renders no services) than he does from the tenant of flat B (possibly identical in accommodation, position and outlook) to whom he is bound to render services in accordance with his contractual obligations.

Secondly, Mr. Paull assumed that between September 1, 1939, and the date of application to the rent tribunal (*a*) the rates on the whole house were increased by 20*l.* (*b*) the landlord spent 200*l.* by way of reconstruction on each flat and (*c*) notices of increase had been duly served on former tenants of the flats. The result of these hypotheses is that the "ceiling" rents for the flats became as follows: flat A, 70*l.* plus 7*l.* plus 16*l.* equals 93*l.*; flat B, 70*l.* plus 7*l.* plus 16*l.* equals 93*l.*; flat C, 60*l.* plus 6*l.* plus 16*l.* equals 82*l.* If, upon the application of the tenants of flats B and C, the tribunal reduces those rents we cannot but think that their decision "affects" the provisions of s. 2, sub-s. 1, of the Act of 1920 and sch. 1 to the Act of 1939.

It is then, thirdly, assumed that, after the tribunal has given its decision, (*a*) the rates on the whole house are further increased by 20*l*., and (*b*) the landlord spends a further 200*l*. on structural alterations to each of the flats. In order to obtain the increase referable to these considerations the landlord must, under s. 3, sub-s. 1, of the Act of 1920, give his tenants a month's notice to quit, whereupon they become statutory tenants, and also give notices of increase (s. 3, sub-s. 2). The landlord accordingly gives these notices with the result that the permitted rent " ceilings " under the Rent Restriction Acts are as follows: flat A, 93*l*. plus 7*l*. plus 8*l*. equals 108*l*.; flat B, 93*l*. plus 7*l*. plus 8*l*. equals 108*l*.; flat C, 82*l*. plus 6*l*. plus 8*l*. equals 96*l*. The rents for flats B and C, however, having been decided upon by the tribunal and registered, it is unlawful for the landlord to receive anything in excess of those rents including, presumably, the increases permitted by the Act of 1920. Surely once again a " provision " of one of the Rent Restriction Acts has been " affected "—and none the less because the landlord might apply for the exercise of the tribunal's discretion on the ground of change of circumstances. Finally, Mr. Paull assumed that, after the rent of flat B or C had been reduced by the tribunal and registered, the tenant of one of the flats leaves and the landlord re-lets without agreeing to provide any services. The result of this would be that the flat in question was no longer within the scope of the Act of 1946 at all. It would appear, however, that the registered rent remains as the " ceiling " rent by reason of the embargo imposed by s. 4 of the Act. There is at all events no express provision to be found in the Act for expunging the entry in the register, or lifting the embargo, to meet this change of circumstances. And on this view again a conflict would arise between the rent registered by the tribunal on the one hand and the provisions of the Rent Restriction Acts for determining the standard rent on the other.

Other illustrations similar to those mentioned could doubtless be found. The appellants' answer to them is that they are merely directed to results. That they show results is true, but the results are the legitimate offspring of the relevant statutory provisions.

All these considerations can lead only to the conclusion that a reduction by a tribunal of a contractual rent to a level below that of the standard rent does affect the provisions of the Rent Restriction Acts, namely, the provisions under which

C. A.
1948

REX v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL. *Ex parte* BEDROCK INVESTMENTS, LD.

the standard rent is determined and, if need be, apportioned and under which it may, in certain circumstances, be increased. Those provisions are "affected" in the sense that they would be disturbed, and even overridden, if the appellants are right. If their argument is sound the simple decision of the rent tribunals could substitute a lower "ceiling" of rent for the "standard" rent permitted by the Rent Restriction Acts. The latter, as we have already said, is the subject of careful and elaborate legislation which, although drastically restrictive of landlords' rights, is not unmindful of them altogether; and the standard rent, with the permitted increases, presumably represents the return which the legislature regarded, and still regards, as proper for a landlord of controlled premises to receive. We cannot but think that if Parliament had intended by the Act of 1946 to authorize the tribunals set up thereunder, in their discretion and by their unappealable decision, to reduce the standard rent and to override the permitted increases they would have expressed that intention in clear and definite terms; and it is to be supposed that they would, moreover, have provided that one member at least of each tribunal should be a person having legal qualifications. We are, however, satisfied that the language of s. 7 of the Act sufficiently shows that such was not the intention of the legislature; which was, on the contrary, that the Act should be supplementary to, but (except as to ss. 9 and 10 of the Act of 1920) in no way destructive of, the Rent Restrictions Acts of 1920 to 1939.

We are of opinion, accordingly, that the rent tribunal exceeded its jurisdiction in making the orders now in question and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants: *The Solicitor, Ministry of Health.*

Solicitors for the respondents: *Thompson & Co.*

P. B. D.

Approved. AMPHLETT v. DORRELL. [1949] 1 K. B. 276

Affirmed. C.A. [1949] 1 All E.R. 402.

LANGFORD PROPERTY COMPANY LIMITED *v.* GOLDRICH.

1948
Apr. 22;
June 11.

Birkett J.

Landlord and tenant—Rent restrictions—Whether two combined flats let together constituted a single "separate dwelling-house"—"Rateable "value on appropriate day"—Reduction of assessments of each flat—Effect of reduction on question whether flats were controlled by Rent Acts—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1, *s.* 7, *sub-ss.* 1, 3.

On July 1, 1941, two flats numbered 13 and 15 respectively on the same floor of a block of flats in Golders Green, Middlesex, together with a garage were let under one tenancy agreement at one inclusive rent to one tenant. The flats were not adjoining one another. Before July 1, 1941, the flats had never been let together to one tenant, but each of them had been let to a different tenant other than the tenant to whom they were let on July 1, 1941. On April 1, 1939, namely, the appropriate day within the meaning of s. 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1939, the rateable value of flat No. 13 was 98*l.* and the rateable value of flat No. 15 was 92*l.*, and the rateable value of the garage was 6*l.*, but on March 24, 1940, the valuation list was amended by reducing the rateable value of flat No. 13 to 54*l.*, and the rateable value of flat No. 15 to 52*l.*, and the new rateable values were made to be retrospective as from April 1, 1939. On June 19, 1942, the valuation list was further amended by reducing the rateable value of flat No. 13 to 48*l.*, and the rateable value of flat No. 15 to 46*l.* and the new rateable values were made to be retrospective as from April 1, 1941. The rateable value of the garage remained at all material times at 6*l.*

The rateable value of each flat therefore, at all material times did not exceed 100*l.*, and therefore as the result of s. 3, sub-s. 1, of the Act of 1939 each flat, if separately let to a tenant, would have been controlled by the Rent Acts.

The landlord contended that, as the flats had been let together a new entity had come into existence consisting of one dwelling-house which was not controlled by the Rent Restriction Acts. The tenant, on the other hand, contended that (1.) there had really been two separate lettings, each of which was of a flat controlled by the Rent Restriction Acts, and (2.) if there had been a letting of one dwelling-house constituted by the combined flats, then either (*a*) no assessment of the rateable value of the new house which had come into existence had been made, or, (*b*) if, for the purpose of ascertaining the rateable value of the new house, the rateable values of the two respective flats had to be added together, then the aggregate rateable value thus produced did not exceed 100*l.*, and the new house was therefore within the Rent Acts.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

1948

LANGFORD PROPERTY CO., LD.
v.
GOLDRICH.

Held, that (1.) a new entity had come into existence on July 1, 1941, constituted by the combined flats, (2.) that entity was, however, on the authority of *Sheehan* v. *Cutler* [1946] 1 K. B. 339 and *Selwyn* v. *Hamill* [1948] 1 All E. R. 70, not a separate dwelling-house within the meaning of s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, (3.) even if the new entity did consist of a separate dwelling-house within the statutory meaning, then as it came into existence on July 1, 1941, and on that date the respective rateable values of the two flats shown on the valuation list were 54*l.* and 52*l.*, the aggregate rateable value of the dwelling-house on that date was 106*l.*, a sum which brought the dwelling-house outside the Rent Acts; (4.) the flats were therefore not controlled by the Rent Acts.

ACTION.

The plaintiffs, Langford Property Company, Ld., claimed possession of two flats respectively numbered 13 and 15 and situate on the same floor of a block of flats in Golders Green, Middlesex, within the Metropolitan Police District of London. The flats were not adjoining one another. The flats together with a garage were first of all let to the defendant by an agreement, dated July 1, 1941, at a rent of 300*l.* per annum for a term commencing September 1, 1941. By subsequent agreements the tenancy was renewed from time to time at a progressively higher rent, the latest rent being 525*l.* per annum. Before July 1, 1941, the flats had never been let together to one tenant, but each of them had been let to a different tenant other than the defendant.

On May 27, 1947, the tenancy was determined by the plaintiffs by a notice in prescribed terms, but the tenant refused to give up possession and claimed the protection of the Rent Restriction Acts. He counterclaimed for repayment of money which he had paid as rent in excess of the standard rent of 300*l.* per annum.

In order to decide whether or not the flats were protected by the Rent Acts it was necessary to ascertain whether for the purpose of those Acts the two flats together constituted a separate dwelling-house within the meaning of s. 16, sub-s. 1, of the Act of 1933 (1) and secondly, if so, whether its " rateable

---

(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, sub-s. 1: " In this " Act, unless the context other- " wise requires, the following ex- " pressions have the meanings " hereby respectively assigned to " them, that is to say: ' Dwelling- " ' house ' has the same meaning " as in the principal Acts that is " to say a house let as a separate " dwelling or a part of a house " being a part so let . . . ."

"value on the appropriate day" did not or did exceed 100*l.* a year (the maximum figure fixed for the Metropolitan Police District for this purpose) within the meaning of s. 3, sub-s. 1 and s. 7, sub-s. 1 on the one hand or sub-s. 3 on the other hand, of the Act of 1939 (1).

As the two flats were situate in Golders Green, Middlesex, the appropriate day within the meaning of s. 7, sub-s. 1 of the Act of 1939 was April 1, 1939. On that date the rateable value of flat No. 13 was 98*l.* and the rateable value of flat No. 15 was 92*l.* On March 24, 1940, the valuation list was amended by reducing the rateable value of the flat No. 13 from 98*l.* to 54*l.* and of flat No. 15 from 98*l.* to 52*l.* in each case retrospectively as from April 1, 1939. On June 19, 1942, the valuation list was further amended by reducing the rateable value of flat No. 13 from 54*l.* to 48*l.* and of flat No. 15 from 52*l.* to 46*l.* in each case retrospectively as from April 1 1941.

The landlord contended that on the date of the letting, namely July 1, 1941, a separate entity had come into existence constituted by the combination of the two flats and that (1.) such entity did not constitute a separate dwelling-house within the meaning of s. 16, sub-s. 1 of the Rent and Mortgage

---

(1) Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1: "Without prejudice to "the operation of the two pre-"ceding sections in relation to "any dwelling-house to which the "principal Acts applied imme-"diately before the commence-"ment of this Act, the principal "Acts, as amended by the last "preceding section shall, subject "to the provisions of this section, "apply to every other dwelling-"house of which the rateable "value on the appropriate day "did not exceed—

"(*a*) in the Metropolitan Police "District or the City of London, "100*l.* . . . ."

Section 7, sub-s. 1: "In this "Act the following expressions "have the meanings hereby "respectively assigned to them, "that is to say :—'rate-"'able value on the appro-"'priate day' in relation to any "dwelling-house, means (subject "to the following provisions of "this section) the value shown, "with respect to that dwelling-"house, on that day in the "valuation list then in force, as "the rateable value or, where the "net annual value differs from the "rateable value, as the net annual "value and 'the appropriate "'day' means, as respects the "administrative county of Lon-"don, the 6th April, 1939 or, as "respects the remainder of Eng-"land, the 1st April, 1939 . . . ."

Sub-s. 3: "In relation to any "dwelling-house first assessed "after the appropriate day, any "reference in the preceding pro-"visions of this Act to the rateable "value on the appropriate day "shall be construed as a reference "to the rateable value on the day "on which the dwelling-house was "first assessed."

1948

LANGFORD PROPERTY CO., LD. v. GOLDRICH.

Interest Restrictions (Amendment) Act, 1933, and therefore what was let did not come within the Rent Restriction Acts, and (2.) alternatively, if the new entity did constitute a separate dwelling house within the statutory meaning, then as the rateable value of that dwelling house on July 1, 1941, consisted of the aggregate of the two rateable values of the respective flats added together, and such rateable values as shown in the valuation list on July 1, 1941, were respectively 54*l.* and 52*l.* producing a total of 106*l.*, it followed that on this alternative that which was let did not come within the Acts.

The tenant, however, contended that (1.) there were two separate lettings, namely, the letting of each of the two flats, and as the rateable value of each flat at all material times was below 100*l.*, both flats came within the Acts; (2.) alternatively, if the combined flats constituted one dwelling-house, then the rateable value of that dwelling-house had never been assessed, and, therefore the combined flats were within the Acts for the landlord had not proved the contrary and (3.) alternatively if the rateable values of the two flats had to be added together in order to ascertain the rateable value of the entity constituted by the combined flats then those rateable values were respectively 48*l.* and 46*l.* producing a total of 94*l.* because by the amendment made on June 19, 1942, those rateable values were assessed as from April 1, 1941.

Safford K.C. and *Heathcote-Williams* for the plaintiffs. These two flats and garage were not within the Rent Restriction Acts because they had to be regarded as one entity, but that entity was not either a house or part of a house let as a separate dwelling within the meaning of s. 16, sub-s. 1, of the Act of 1933. The combination of these two flats did not constitute a separate dwelling-house within that meaning because the accommodation which was provided was not contained in a single house, but in two separate houses or flats: see *Sheehan* v. *Cutler* (1) and *Selwyn* v. *Hamill* (2). Both of these cases dealt with the question of what was "suitable alternative "accommodation" within the meaning of s. 3 of the Act of 1933, but in dealing with that question they laid down the principle which is the basis of this submission. In *Sheehan* v. *Cutler* (1) Morton L.J. said that under s. 3, sub-s. 3 of the Act of 1933 "Accommodation shall be deemed to be suitable "if it consists—(*a*) of a dwelling-house to which the principal

(1) [1946] K. B. 339.

(2) [1948] 1 All E. R. 70.

1948

LANGFORD PROPERTY CO., LD. *v.* GOLDRICH

"Acts apply." There were other conditions but the principle underlying the conditions for the provision of suitable alternative accommodation was the provision of (1.) accommodation in a dwelling-house to which the principal Acts apply or its equivalent and (2.) the tenant and his family regarded as one unit had to be accommodated in one dwelling-house or its equivalent. Those conditions were not satisfied by the offer of a house with the additional offer of a single room in another house. The other members of the court concurred. In *Selwyn* v. *Hamill* (1) it was held that the conditions for suitable alternative accommodation were not satisfied by the offer of certain living rooms in one house and a bedroom in another house under the same roof. The ratio decidendi of those two cases therefore with respect to this particular point is that accommodation in more than one house does not constitute accommodation in a "dwelling-house" within the meaning of the Rent Acts as provided by s. 16, sub-s. 1 of the Act of 1933. The entity constituted by these two flats did not therefore constitute a separate dwelling-house within the statutory meaning.

If, on the other hand, the entity constituted by the two combined flats is a separate dwelling-house within the statutory meaning, then that entity came into existence for the first time either on July 1, 1941, or September 1, 1941, namely, either the date when the first tenancy agreement was made or the date when that tenancy began. Which of these dates is the correct date is immaterial for the purpose of this submission. The rateable value of these two flats on either of those dates was the same, and it is that rateable value which decides whether they were as one entity within or outside the Acts: see s. 7, sub-s. 1 of the Act of 1939. Sub-section 1 provides that the rateable value on the appropriate day (i.e. in this case April 1, 1939) is the value shown on that day in the valuation list then in force. The rateable value shown on July 1, and September 1, 1941, in the valuation list as fixed respectively from April 1, 1939, was 54*l*. for flat No. 13 and 52*l*. for flat No. 15. That is a total of 106*l*. and, therefore, the rateable value of the two flats together on the appropriate day exceeded 100*l*. a year and the entity constituted by the two flats came outside the Acts. The fact that there was a subsequent amendment made on June 19, 1942, reducing the rateable values is quite irrelevant. On the crucial alterna-

(1) [1948] 1 All E. R. 70.

tive date July 1, or September 1, 1941, there was no other means of ascertaining the rateable value of the entity which had just come into existence except by adding together the rateable value of each flat as shown on the valuation list on that particular date. *Attorney-General* v. *Mutual Tontine Westminster Chambers Association Ld.* (1) is an authority supporting the proposition that the annual value should be ascertained in this way.

Scott Henderson K.C. and *I. H. Jacob* for the defendant. My first submission is that the defendant has been in occupation of two separate flats to each of which the Rent Restriction Acts apply. My second submission is that if I am wrong in my first submission and the defendant has been in occupation of one dwelling-house, then the status of that dwelling house has to be ascertained as from July 1, 1941, the date when the first tenancy began, and, furthermore (1.) in ascertaining the rateable value of that particular dwelling-house it is wrong to endeavour to do so merely by adding together the respective rateable values which were assessed for the two flats before they were combined into one flat; (2.) alternatively even if those rateable values have to be added together for this purpose, then on the crucial date, July 1, the aggregate of these values did not exceed 100*l.*

As regards the first submission that the defendant was in occupation of two separate flats, I propose to give the following hypothetical cases in support of that submission. If there had been two tenants, namely, a tenant of each flat, both tenants would have been entitled to the protection of the Rent Acts. Supposing that each of these two flats had been on different floors in the same block of flats and was owned by the same person, or, carrying the inquiry further, supposing that each of them was in a different building and was owned by the same person, then a man who happened to be a tenant of each would be entitled to the protection of the Rent Restriction Acts in respect of each. A man might be the tenant of one house in London and another in the country and the landlord of each house might be the same person. The tenant in that case would be entitled to the protection of the Acts in respect of each house.

Where the tenant is in occupation of two dwelling-houses in the same block of flats under the same landlord, then if they are structurally two separate dwelling-houses, they should

---

(1) (1876) 1 Ex. D. 469, 481, 482.

1948

LANGFORD PROPERTY CO., LD. *v.* GOLDRICH.

be regarded as two separate dwelling-houses for the purpose of the Acts. As that is the position, the only complication which has arisen is that the tenancy has been created by one document. That fact makes no difference and does not alter the fact that the defendant is in possession of two separate dwelling-houses. Nor does it make any difference that one rent is reserved in respect of both the flats. Supposing that a man had one flat in London and another in the country each of which were within the Acts and he lets them at an inclusive rent to the same tenant. In that case each of them would still remain within the Acts. The crucial matter is that they are two separate dwelling-houses. It is not a case of two separate dwelling-houses each of which is within the Acts constituting two parts of a larger dwelling-house as in *Vaughan* v. *Shaw* (1). These two dwelling-houses did not constitute one dwelling-house by reason of being put into the same demise.

[BIRKETT J. If there are two houses, each of which is within the Acts and they are four miles apart and the landlord lets them together to the same tenant and their combined rateable value is over 100*l.* would you say that they would be protected by the Rent Acts in those circumstances? What has been done in this case is that two separate flats, each of which is under the protection of the Acts, have both been let to the same tenant, therefore you say that the Rent Restriction Acts should be deemed to apply to each?]

Yes. Section 12, sub-s. 6 of the Act of 1920 provides that once a dwelling-house has come within the Act it cannot be taken out of the Act again. Each of these two flats was within the Acts just before July 1, 1941, therefore it is in accordance with that sub-section to assert that no arrangements between the landlord and the tenant can take them out of the Acts. The fact that they are close together and happen to be on the same floor of a block of flats ought not to affect the principle. I admit, however, that if they were structurally converted into one flat, then as each flat would have lost its identity, the position would have been different.

My second point is this—If the two flats together constitute one separate dwelling-house, it only came into existence as a separate dwelling house on July 1, 1941, when the tenancy began. Counsel for the plaintiffs has referred to s. 7, sub-s. 1 of the Act of 1939. I, however, stress s. 7, sub-s. 3. I rely

(1) [1945] K. B. 400.

on the words "on the day on which the dwelling-house was "first assessed." As the tenancy began on July 1, 1941, it was impossible to assess the dwelling-house constituted by the combined flats before that date, because that house only came into existence on that date. According to the principle laid down in *Vaughan* v. *Shaw* (1) the rateable value must be fixed for the whole house and should not be fixed by adding up the rateable values of its parts. In that case it was decided that where before September 1, 1939, a house was let in two parts and after that date it was let as a whole for the first time, the standard rent was the rent at which the whole house was let and was not the total of the two respective sums received by the landlord for the previous letting in two parts. The same principle should be applied in ascertaining the rateable value: it is the rateable value of the combined flats which one has to consider, and not the aggregate of the value of each flat.

The house, on the hypothesis of its consisting of the combined flats, never had a rateable value before July 1, 1941, and it could not be assessed until that date. To ascertain what the assessment should be, it was necessary to wait until there was a new assessment after that date, because all past assessments had no effect owing to the fact that the dwelling-house did not exist before that date. If the new assessment was not more than 100*l.* then the new dwelling-house would come within the Acts, but there was no new assessment. By s. 7, sub-s. 1 of the Act of 1938 it is provided that a dwelling-house shall be deemed to be within the Acts unless the contrary is shown, therefore, the burden of proof that the rateable value is over 100*l.* is on the landlord. His task in discharging that burden is an impossible one, because no rateable value as yet has been assessed for the new dwelling-house. If, however, one assessed the rateable value by adding up the rateable values in force on July 1, 1941, then those rateable values were respectively 48*l.* and 46*l.* which give a total of only 94*l.* Even if one adds the 6*l.* which was the rateable value of the garage, the total only becomes exactly 100*l.* and in either case the house comes within the Rent Restriction Acts.

The first amendment to the valuation list made after July, 1941, was made on June 19, 1942, and it related back to April 1, 1941. Therefore, if one is to add the rateable values of the two flats that could not be done until June 19, 1942, namely, when the first amendments were made, but as they

(1) [1945] K. B. 400.

were related back to April 1, 1941, that was the date when the assessment was deemed to have been made and is the date to which effect must be given for the purposes of s. 7, sub-s. 3 of the 1939 Act.

[BIRKETT J. How can you say that the aggregate value was not over 100*l.* on July 1, 1941? On that day it exceeded 100*l.* It was not until June 19, 1942, that it was reduced to a figure which was not in excess of 100*l.*]

The date of the amendment must relate back to April 1, 1941. Section 20 of the Rating and Valuation Act, 1925, provides that "the valuation list as in force at the date when "the valuation is made . . . . shall be conclusive evidence "of the values of the several hereditaments included in the "list." As the amendments are made after the rate is made the amendments operate back to the date of the rate in the valuation list. As a matter of fact one cannot aggregate what had been separate parts of a dwelling-house. I was only assuming for the purpose of this part of my argument that one could aggregate them. No dwelling-house was let in 1941 which had a rateable value of over 100*l.*

Safford K.C. in reply. As regards the submission that once a dwelling-house has come within the Rent Restriction Acts it cannot be taken out of them because of the provisions of s. 12, sub-s. 6 of the Act of 1920, that sub-section does not go so far as is suggested, for in *Haldane* v. *Sinclair* (1) it was held that where a house, falling within the Rent Restriction Acts was re-let with other land, the rateable value of which was more than one-quarter of that of the house, the provisions of proviso (iii) to s. 12, sub-s. 2, of the Act of 1920 applied to take the house out of the Rent Acts.

Cur. adv. vult.

June 11. BIRKETT J. [His Lordship stated the facts, read s. 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1939, and continued :] The Act of 1939 of course brought into the ambit of the Rent Restriction Acts a very large number of houses that hitherto had been exempted, and this is a provision with which I am particularly concerned here to-day. Then in the same Act of Parliament, in s. 7, under "Interpretation," these words occur: "'rateable value on "'the appropriate day,' in relation to any dwelling-house,

(1) 1927 S. C. 562.

1948

LANGFORD PROPERTY CO., LD. v. GOLDRICH.

Birkett J.

"means (subject to the following provisions of this section) "the value shown, with respect to that dwelling-house, on "that day in the valuation list then in force, as the rateable "value or, where the net annual value differs from the rateable "value, as the net annual value."

That section makes it clear that when you are looking for the rateable value on the true day you have to look at the value shown in respect to the particular dwelling-house on that day in the valuation list then in force; and, further, s. 7 says: "'the appropriate day' means, as respects the "administrative county of London, the sixth day of April, "nineteen hundred and thirty-nine, or, as respects the "remainder of England, the first day of April nineteen hundred "and thirty-nine." Therefore, looking at the rateable value on the appropriate day, the 1st April, 1939, that rateable value would appear, on the figures I have cited, to be in excess of 100*l*.

Section 16 of the Act of 1933 reads in this way, looking at the interpretation clause: "'Dwelling-house' has the same "meaning as in the principal Acts, that is to say, a house let "as a separate dwelling or a part of a house being a part so "let."

Counsel for the plaintiffs contended that this house set out in the agreement of July 1, 1941, could not possibly come within that definition, it was not a dwelling-house within the meaning of the statute. Mr. Scott Henderson for the defendant, on the contrary, said, "I put it in two ways. First of all, "the defendant was in occupation of two dwelling-houses, to "which these Acts applied, namely, No. 13 and No. 15, and he "was entitled to the protection of the Rent Acts because of that "fact. Alternatively," he said, "if that is not acceptable, the "tenant was in occupation of one dwelling-house, that is, "two flats regarded as one, and that July 1, 1941, is the date "at which you must look to ascertain the status of that house," and he referred me to s. 7, sub-s. 1, of the Act of 1938.

That sub-section says: "If any question arises in any pro-"ceedings whether the principal Acts apply to a dwelling-"house, it shall be deemed to be a dwelling-house to which "those Acts apply unless the contrary is shown."

The conclusion to which I have come on that first matter is that this is not a dwelling-house within the meaning of the Rent Restriction Acts; and on that matter there are two cases which I think are helpful, although they are not exactly

1948

LANGFORD PROPERTY CO., LD. *v.* GOLDRICH.

Birkett J.

on the point in question. The first is *Sheehan* v. *Cutler* (1). That was a case which was dealing with suitable alternative accommodation under the Act. The headnote reads: "'Suitable alternative accommodation available for the "'tenant'"—those are the quoted words—"within the "meaning of the Rent and Mortgage Interest Restrictions "(Amendment) Act, 1933, sub-s. 3, contemplates accommo-"dation in a single dwelling-house and is not satisfied by the "offer of a house with the additional accommodation of one "room in a separate house."; and Morton L.J., who dealt rather fully with the matter, said this (2): "What this court "has to determine is whether accommodation in two separate "houses, for which provision is made in the judge's order, is "'suitable alternative accommodation' within the meaning "of s. 3, sub-s. 1, of the Rent and Mortgage Interest Restric-"tions (Amendment) Act, 1933, and that, in turn, depends on "whether the proposed accommodation falls within the terms "of sub-s. 3 of s. 3. That sub-section applies to the present "case, and provides, by sub-clause (*a*) that 'accommodation "'shall be deemed to be suitable' if it consists of 'a dwelling-"'house to which the principal Acts apply.' It may be "pointed out that under the Interpretation Act, 1889, the "words 'a dwelling-house' would include the plural unless a "contrary intention appears. In my opinion, for reasons "which I shall mention later, a contrary intention does appear "in the present instance. The sub-section goes on to provide "by sub-clause (*b*) as an alternative, that accommodation "shall also be deemed to be suitable if it consists of 'premises "'to be let as a separate dwelling' on terms which will afford "to the tenant security of tenure reasonably equivalent to the "security afforded by the principal Acts in the case of 'a "'dwelling-house to which these Acts apply.' The repeated "use of the singular is to be noted. So far, two alternatives "have been stated, but there follows a further qualification "which the accommodation offered must possess if it is to be "deemed to be suitable. It must be 'reasonably suitable to "'the needs of the tenant and his family as regards proximity "'to place of work.' It seems to me that in this sub-section "the legislature is regarding the tenant and his family as one "unit and is providing that that unit is to be accommodated "in one dwelling-house under sub-clause (*a*) or in premises "to be let as one separate dwelling on terms which answer the

(1) [1946] K. B. 339.

(2) Ibid. 342, 343.

"description given in sub-clause (*b*). The provisions which "follow, and in particular the provisions of sub-clause (ii.) in "reference to 'the needs of the tenant and his family' in regard "to the extent and character of the accommodation, point in "the same direction. We were referred to the definition of "'dwelling-house' in s. 16 of the Act where it is said that "'dwelling-house has the same meaning as in the principal "'Acts, that is to say, a house let as a separate dwelling or "'a part of a house being a part so let.' That perhaps, does "not carry the matter much further." Then the learned Lord Justice goes on to deal further with those matters and comes to the conclusion, with which the other members of the court agree, that the question of suitable alternative accommodation is not satisfied by the offer of a house with the additional offer of a single room in another house but contemplates similar accommodation to the accommodation which he originally had.

The next case is the case of *Selwyn* v. *Hamill* (1). The headnote in that case reads: "A landlord, who had become "landlord by purchase in 1945, claimed possession of a con- "trolled dwelling-house, offering the tenant alternative "accommodation consisting of a living room, kitchen and "bathroom in one dwelling-house and a bedroom in a separate "dwelling-house, the two premises, although under the same "roof, being divided by a third dwelling-house. *Held*: "(i.) the accommodation offered did not consist 'of premises "'to be let as a separate dwelling' as required by the Rent "and Mortgage Interest Restrictions (Amendment) Act, 1933, "s. 3, sub-s. 3 (*b*) and was not, therefore, 'suitable' within the "meaning of the section"; and the case I have just cited, *Sheehan* v. *Cutler*, was applied. Tucker L.J. in the course of that case—*Selwyn* v. *Hamill*—said (2): "It is said by counsel "for the landlord that, this point not having been taken in the "court below and the judge's attention not having been drawn "to *Sheehan* v. *Cutler*, we ought to send the case back for "a new trial to give the judge an opportunity of considering "whether No. 4A alone might not constitute reasonably suitable "accommodation. As it appears clear from the judge's note "that this point, which is a pure point of law, was never taken "in the court below, if there were any possibility that, on "a further investigation of the facts, the judge might come to "the conclusion that No. 4A was reasonably suitable accom-

---

(1) [1948] 1 All E. R. 70.

(2) Ibid. 70, 71, 72.

"modation, I should certainly have been disposed to send the "case back for a new trial because it is most unsatisfactory "that cases should be dealt with without the tribunal to which "jurisdiction is given under these Acts having had an opportunity of investigating the facts fully and properly. On the "facts of this case, however, I am driven to the conclusion that "it would be impossible as a matter of law for the judge to "find that No. 4A by itself was reasonably suitable accommodation for this family which consists of an elderly invalid "lady and two grown-up daughters who are working. The "living-room which would have to be used as a bed-sitting "room and kitchen could not possibly be said to be accommodation which was reasonably suitable for these ladies. "I, therefore, think that it would not be right to order a new "trial and we are bound to allow this appeal."

That was a case where the alternative accommodation consisted of premises, which although under the same roof were separate, 4A and 2A being separated by 3A; and it was held that that could not be regarded as a separate dwelling-house. The matter, therefore, on this first point, in my opinion must be decided in favour of the plaintiffs: that the letting in the agreement of July 1, 1941, is not a dwelling-house within the meaning of the Act of Parliament.

With regard to the second point which was raised by plaintiff's counsel: He said if these two flats can be regarded as a dwelling-house within the meaning of the Act of Parliament, and are so regarded, then on the appropriate day, April 1, 1939, the rateable value was clearly over 100*l*. There, again,the plaintiffs would be entitled to succeed.

Mr. Scott Henderson for the defendant said, "Well, I am not "disposed to agree that that is the date that has to be taken "into account. The rateable value is to be ascertained with "regard to July 1, 1941. If one tenant is in No. 13 and another "in No. 15 these Acts apply; they are two separate dwellings. "The fact that there is one demise makes no difference; the "fact that there is one rent for both makes no difference." He referred me to the Act of 1920, s. 12, sub-s. 6; that the Act once effective is always effective. That was countered by Mr. Safford for the plaintiffs, who referred me to *Haldane* v. *Sinclair* (1). He said that where there is the letting of the two flats as one demise the landlords were entitled to use the decision in the Scottish case. Mr. Scott Henderson further said: "If this is

---

(1) 1927 S. C. 562.

"a separate dwelling-house, as I contend it is, it became so "for the first time on July 1, 1941, and you must look at s. 7, "sub-s. 2 and sub-s. 3 of the Act of 1939." There was, he said, no separate assessment of the two flats as a separate dwelling at any time. Of course, that is quite right. The only assessment before me was the assessment on the valuation list of the two flats singly and individually, and "the appropriate day" he therefore submitted, could not be before July 1, 1941, because before then it was not a separate dwelling. There had never been any new assessment, and the onus was therefore on the landlord to show that the rateable value was over 100*l*. He said it was impossible for him to do that because there never was a separate rateable value for those two flats treated as one.

I think those were the submissions he made with regard to that matter, and I can only say that the view I take of the facts of this case, having regard to the provisions of s. 7 of the Act of 1939, is that I must look at the rateable value as shown in the valuation list as on April 1, 1939; and if it is conceded that that is the appropriate day, then the rateable value is over 100*l*. I am of the opinion that that is the date to which I ought to look.

His Lordship then dealt with a question of estoppel which had been raised by counsel for the defendant and held that the doctrine of estoppel did not apply to the case.

In those circumstances, I must give judgment here for the plaintiffs on the claim and counterclaim.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Stikeman & Co.*
Solicitors for the defendant: *Franks, Charlesly & Leighton.*

C. A.
1948
July 12.
Scott and Cohen L.JJ.

ALEXANDER MOUNTAIN & CO. (SUING AS A FIRM) v. RUMERE, LD.

Practice—Parties—Action begun in name of a firm—Sole proprietor dead at date of writ—Application to substitute his executrix as plaintiff—Misnomer—R. S. C. Or. 16, *r.* 2, *Or.* 48, *r.* 1.

In the case of the mere misnomer of a plaintiff on a writ, the defendant, by a summons supported by an affidavit, can compel the plaintiff to amend. If the defendant does not exercise this power, and the matter proceeds to trial, the misnomer can then be amended, and in no circumstances can it affect the substantive judgment which the court is called on to pronounce.

Decision of Lord Goddard C.J. [1948] W. N. 243, overruled on the facts.

APPEAL from Lord Goddard C.J.

During his life-time, one Alexander Mountain carried on business as Alexander Mountain and Co., he being the sole proprietor of the business. He died on July 10, 1947. By his will he appointed his wife, Doris Mountain, as his executrix, and she continued to carry on the business in the name of Alexander Mountain & Co. On October 12, 1947, a writ was issued in the name of Alexander Mountain & Co. (suing as a firm) against the defendants, Rumere Ld., in respect of a matter which arose during the life-time of Alexander Mountain. Shortly before the action came on for hearing it was ascertained by the plaintiff's solicitors that, in fact the business of Alexander Mountain & Co., had been the sole property of Alexander Mountain and that, consequently, by reason of the provisions of R. S. C. Or. 48, r. 1, the writ had been issued in the wrong name, since the rule provides that an action may be brought in the name of a firm only when it consists of two or more partners. The plaintiffs' solicitors notified the defendants' solicitors that when the action came on they proposed to apply under Or. 16, r. 2 (1) to amend the writ by substituting thereon the name of "Doris Mountain, "Executrix of Alexander Mountain, deceased." The defendants objected that there was no power to make the amendment, and at the suggestion of Lord Goddard C.J. a summons returnable at once was taken out which it was agreed should be treated as a summons taken out before the hearing of the action. On the hearing of the summons a joint affidavit by Doris Mountain and her brother-in-law M. V. Haron was read in which the former stated that in her husband's life-time

---

(1) R. S. C. Or. 16, r. 2: "Where "an action has been commenced "in the name of the wrong person "as plaintiff, or where it is doubt- "ful whether it has been com- "menced in the name of the right "plaintiff, the court or a judge, "may, if satisfied that it has been "so commenced through a bona "fide mistake, and that it is "necessary for the determination "of the real matter in dispute so "to do, order any other person to "be substituted or added as "plaintiff upon such terms as may "be just."

C. A.
1948

ALEXANDER MOUNTAIN & CO. (SUING AS A FIRM) *v.* RUMERE, LD.

he carried on business in the style or firm name of Alexander Mountain & Co., and that since his death she had continued to carry on his business as his executrix in the same name with the assistance of her brother-in-law, M. V. Haron. The latter stated that he was the brother-in-law of Alexander Mountain, and that in March, 1946, he joined him in the export business which he carried on in the name of Alexander Mountain & Co., that being Alexander Mountain's firm name, and there being no partnership. After the death of his brother-in-law he continued to assist Doris Mountain, who carried on the business in the firm name of Alexander Mountain & Co. Lord Goddard C.J. following *Clay* v. *Oxford* (1) and *Tetlow* v. *Orela Ld.* (2) held that the action having been begun in the name of a dead man, his executrix could not be substituted as plaintiff. The fact that the action was wrongly commenced in the name of Alexander Mountain & Co. made no difference and there was no power under Or. 16, r. 2, to amend the writ. The plaintiff appealed. On the hearing of the appeal a further affidavit by the managing clerk to the plaintiffs' solicitors (which was not before Lord Goddard C.J.) was read in which the deponent stated that he had had the conduct of the proceedings on behalf of the plaintiffs. When his principals were consulted in the action by M. V. Haron he was under the mistaken impression that the late Alexander Mountain had been carrying on the business of Alexander Mountain & Co. in partnership and that M. V. Haron was one of the partners. He also believed that the death of Alexander Mountain had not terminated the partnership and that it continued. When he caused the writ in the action to be issued, he was, therefore, under the mistaken impression that he was issuing the writ in the name of the correct plaintiffs, since at that time he had no knowledge that Alexander Mountain had been carrying on business in his own name in the style of Alexander Mountain & Co., and that subsequently his widow was continuing to carry on the business by herself in the same name. It was not until a short time before the action came on for trial, when the defendants asked for particulars under Or. 48A, r. 1, that he discovered the true position.

Claude Duveen for the plaintiff.
Gerald Gardiner K.C. and *W. Gumbel* for the defendants.

(1) (1866) L. R. 2 Ex. 54.

(2) [1920] 2 Ch. 24.

SCOTT L.J. I will ask COHEN L.J. to deliver the first judgment.

COHEN L.J. This is an appeal from Lord Goddard C.J., who refused leave to the plaintiff in the action to amend the writ by substituting for the description of the plaintiffs therein appearing, "Alexander Mountain & Co., suing as a firm," the words "Doris Mountain, executrix of Alexander Mountain, "deceased." The late Alexander Mountain, died on July 10, 1947, and the writ in the action was issued on October 24, 1947. By the terms of Or. 48 (*a*), r. 1, an action can only be brought in the name of a firm when it consists of two or more partners. In the present case it was ascertained shortly before the trial that in fact the business of Alexander Mountain & Co. had been the sole property of Alexander Mountain. At the time of the issue of the writ he was, to the knowledge of everybody, dead, and no one thought that a writ was being issued in his name as a living person. On it being discovered that the firm consisted of only one person, the solicitors for the plaintiff notified the defendants' solicitors that when the action came on for hearing they proposed to apply for leave to amend the writ in the manner I have mentioned. When the matter came before Lord Goddard C.J., he decided, with considerable reluctance as appears from his judgment, that he had no jurisdiction to make the amendment. It was argued before him that he had jurisdiction to make the order for which the plaintiff asked by virtue of the provisions of Or. 16, r. 2, but, basing his decision in the main on *Tetlow* v. *Orela, Ld.* (1) he came to the conclusion that he had no power to do so. In *Tetlow* v. *Orela, Ld.* (1) the action had been commenced in the name of Joseph Tetlow and the writ was issued in the mistaken belief that he was alive. The position, therefore, was that the writ had been deliberately issued in the name of a dead man in the bona fide belief that he was living. Russell J., basing his decision on *Clay* v. *Oxford* (2), in which it was held that where an action is commenced in the name of a dead man, his representative could not be substituted as plaintiff, held that he had no jurisdiction to substitute the widow of the dead man as plaintiff. The decision in *Tetlow* v. *Orela, Ld.* (1) is not binding on this court but the decision in *Clay* v. *Oxford* (2) is so binding, and I should follow it if, in my view, the present case was not distinguishable from it on the facts. In both

(1) [1920] 2 Ch. 24. (2) L. R. 2 Ex. 54.

C. A.

1948

ALEXANDER MOUNTAIN & CO. (SUING AS A FIRM) *v.* RUMERE, LD.

Cohen L.J.

the cases to which I have referred the writ was deliberately issued in the name of a dead man in the mistaken belief that he was alive and in such a case I do not think that Or. 16, r. 2, applies. In the present case the action was not commenced in the name of a dead person in the mistaken belief that he was alive, and, on that ground, I think that the case is distinguishable. Here the husband had died, and his widow was his sole executrix and beneficiary. In the joint affidavit filed by her and her brother-in-law she says that after her husband's death she continued to carry on the business in the name of Alexander Mountain & Co. with the assistance of her brother-in-law, M. V. Haron. As I read that evidence, the position was that in what M. V. Haron did in relation to the company, he was acting with the authority of Doris Mountain, and as her agent, and was so acting when he gave the necessary instructions to the plaintiff's solicitors. Unfortunately, he did not tell them that Doris Mountain, as her husband's executrix, was the sole person entitled to carry on the business, with the result that they were under the impression that M. V. Haron was a partner in it. The solicitors' managing clerk in his affidavit (which was not before Lord Goddard C.J.), said that when he issued the writ he had no knowledge that Alexander Mountain had been carrying on business alone in the style of Alexander Mountain & Co. and that subsequently Doris Mountain was continuing to carry on the business by herself in the same name. It is plain that the managing clerk knew that Alexander Mountain was dead, and the true view of the evidence seems to me to be that the plaintiff's solicitors, by their clerk intended to issue the writ on behalf of the persons entitled to the business of Alexander Mountain & Co. They mistakenly thought that M. V. Haron was a partner, but they were intending, and were entitled, to issue the writ on behalf of the persons entitled to the business. I do not think that the fact that M. V. Haron, who had been authorized to act on Doris Mountain's behalf, did not make the position clear to the plaintiff's solicitors, ought to deprive her of the benefit of her agent's authorized act. The writ was issued in the name of Alexander Mountain & Co. That was wrong because Or. 48 (*a*), r. 1, does not allow a single person to sue in the name of a firm. I think, however, that the case is one of mere misnomer. Misnomer, in the case of a plaintiff is mentioned in the Annual Practice, p. 10, where there is a reference to an article in the Law Journal Newspaper of May 9, 1942, p. 150.

In that article, after commenting on *D. Glanville & Co., Ld.* v. *Lyne* (1), in which a writ had been issued on behalf of a corporation in a wrong name and judgment was entered for the defendant on the ground of the non-existence of the plaintiffs, the author proceeds to lay down what he believes to be the correct rule in the case of the misnomer of a party. He says this: "it is "submitted that there never was a time, not even in the "days before the rigour of the procedure at common law had "been modified by statute, when such a judgment on the trial "of an action could have been appropriate in a mere case of "misnomer. It may be doubted whether it would have "occurred to anyone in the above case to suggest a judgment "in this form if the plaintiff had been an individual, one of "whose names had been omitted, or wrongly abbreviated "instead of a corporation. There is however no magic in "the name of a corporation. It is true that a corporation, "whether limited or otherwise, can sue only in its corporate "name, but, equally, an individual can only sue in his proper "name." The author then proceeds to quote from Stephen's Principles of Pleading, 1st ed. (1824), p. 320, "A mistake in "the name of a party to the suit is ground for 'a plea in "'abatement only, and cannot be objected as a variance at "'the trial.' That is to say, if the plaintiff's name did not "correctly appear in the writ, the defendant could formerly "plead this in order to defeat the action in the particular "form in which it was originally brought, but this did not "prevent the plaintiff bringing another action in proper form, "and pleas in abatement had normally to be pleaded within "four days of the delivery of the declaration. If the "defendant, therefore, did not at once take advantage of "a misnomer in this way it was not open to him to take "advantage of it at all." After referring to one or two other authorities the article continues: "This was the position up "to the passing of the Civil Procedure Act, 1833, s. 11, of "which abolished pleas in abatement for misnomer altogether. "It gave the defendant the right, instead of pleading in "abatement, 'to cause the declaration to be amended at the "'cost of the plaintiff, by inserting the right name upon "'a judge's summons founded on an affidavit of the right "'name.' This Act is now itself repealed, and all pleas in "abatement are finally abolished by Or. 21, r. 20. A plaintiff, "whether an individual or a corporation is, of course, still

(1) [1942] W. N. 65.

C. A.

1948

ALEXANDER MOUNTAIN & Co. (SUING AS A FIRM) *v.* RUMERE, LD.

Cohen L.J.

"required to bring his action in his proper name. There "does not appear to be any specific rule of court dealing with "the matter, nor do the rules of court deal with misnomers "in any way. It therefore appears that Or. 72, r. 2, applies; "i.e. 'the present procedure and practice' (that is the practice "in force when the rules of 1883 were framed) remains in "force, and the defendant by summons, supported by affidavit, "could compel the plaintiff to amend. If he does not do so, "and the matter proceeds to trial, it is submitted that the "misnomer can then be amended, and that in no circumstances "could the misnomer affect the substantive judgment which "the court is called upon to pronounce."

With that statement of the law I respectfully agree. It was not brought to the attention of Lord Goddard C.J. and if it had been, it is possible that his decision might have been different. Having regard to the facts in the present case I think we can treat it as one of misnomer and allow the plaintiff on terms to make the amendment for which she asks. The appeal will, therefore, be allowed.

SCOTT L.J. I agree and I only wish to add one point: In his judgment in *Tetlow* v. *Orela, Ld.* (1) Russell J., after referring to Or. 16, r. 2, said: "In my opinion that rule means "that, where an action has been commenced between two "living parties by a living plaintiff, and the living plaintiff "afterwards turns out to be the wrong person, an application "may be made to the court, and the court can substitute "another person for the living plaintiff or may add another "person as co-plaintiff as the case may be." Russell J. was not there addressing his mind to the kind of question which we have in the present case, which I agree is one of misnomer.

Appeal allowed.

Solicitors for the plaintiff: *Forsyte, Kerman & Phillips.*
Solicitors for the defendants: *C. Grobel, Son & Co.*

(1) [1920] 2 Ch. 24, 26.

P. B. D.

In re THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933.

C. A.

1948

July 23, 29.

Scott, Cohen and Wrottesley L.JJ.

SYAL *v.* HEYWARD AND ANOTHER.

Foreign judgment—Registration in this country—Application to set aside registration—Fraud on foreign court—Facts in relation to fraud known at the time of judgment—Defence of fraud not raised at trial—Prima facie case of fraud made out on application for issue—Power of court on trial of issue to go into defences which could have been raised at trial—Issue directed, subject to a condition—Jurisdiction—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 1 ; *s.* 4, *sub-s.* 1 (*a*) (*iv.*).

Where an application is made under s. 4, sub-s. 1 (*a*) (iv.) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to set aside, on the ground of fraud, the registration in this country of the judgment of a foreign court, the fraud to be established must be a fraud on the foreign court pronouncing the judgment.

If a prima facie case of fraud is established by the applicant who seeks to set aside the registration, it is not essential that the facts supporting the allegation of fraud should have been discovered since the date of the foreign judgment and the court may direct the trial of an issue, notwithstanding that on such trial, the applicant, to establish his allegation of fraud, will have to adduce evidence which was available to him before the date of the foreign judgment.

In directing the trial of an issue under s. 4, sub-s. 1 (*a*) at the instance of a defendant against whom judgment for a sum of money has been given, the court has no power to impose a term that money should be brought into court by the defendant.

Vadala v. *Lawes* (1890) 25 Q. B. D. 310, applied.

INTERLOCUTORY appeal and cross-appeal from Jones J.

The following statement of the facts is taken, substantially, from the judgment of the court :

On February 12, 1947, the plaintiff, S. G. Syal, an Indian moneylender, obtained judgment against the defendants, Lt. Col. P. H. M. Heyward and Lt. Col. I. A. David, from the first civil judge at Saharanpur, India, on a plaint dated November 19, 1946, in which he alleged that the defendants had borrowed Rs. 20,000 from him on October 7, 1946, and had executed a promissory note for that amount. On November 28, 1947, an order was made by the master that the judgment be registered as a judgment of the King's Bench Division, pursuant to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The defendants applied

C. A.

1948

THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933, *In re.* SYAL *v.* HEYWARD.

for an order that the registration of the judgment should be set aside pursuant to s. 4 of the Act (1), on the ground that the judgment had been obtained by fraud. In support of that application they filed an affidavit in which they alleged that the amount which they had borrowed from the plaintiff was not Rs. 20,000, as alleged by him in the action, but only Rs. 10,800, the difference being made up in part of commission and in part of interest which the defendants alleged that the plaintiff had insisted on being paid in advance. The defendants had not defended the action in the Indian Court. Lt. Col. David stated in the affidavit that he had relied on a promise which he alleged had been made by the plaintiff early in December, 1946, not to take any further proceedings against the defendants and to consent to the proceedings being adjourned for six months from December. Lt. Col. Heyward relied on the same promise and also on the fact that he had left India at the end of December, 1946, on repatriation. On January 13, 1947, a notice was sent by the Indian Court to the defendants notifying them that the case had been adjourned until January 20, 1947, and that in default of their appearance the case would be heard ex parte. In reply to the affidavit of the defendants the plaintiff put in an affidavit in which he denied the material allegations made by the defendants and alleged that the whole of the Rs. 20,000, claimed by him had been advanced. He exhibited the plaint in the action, which he verified on oath, from which it appeared that the plaintiffs' claim was not confined to an allegation that the defendants were indebted to him in Rs. 20,000 on the promissory note, but alleged that they had borrowed that sum. The main basis of the defendants allegation of fraud was that the plaintiff had deceived the court by pretending that he had lent Rs. 20,000, whereas, in fact, he had only lent Rs. 10,800, thereby concealing from the court the possibility that the defendants might have a defence under the Indian Usurious Loans Act, 1918, which corresponds to the Money-lenders Acts in this country. On the above evidence the matter came before the master on June 1, 1948, when he dismissed the application on the ground that all the facts on which the defendants relied were known to them at all material times and could have been raised by way of defence in the Indian proceedings. The defendants appealed to the judge, and, before the matter came before him, they filed evidence in answer to the affidavit filed on behalf of the plaintiff. Lt. Col. David in an affidavit sworn by him on June 9, 1948, said: "I further say that the plaint dated November 19, "1946 . . . . was a fraud upon the court to which it was "presented inasmuch as it stated that Lieut. Col. Heyward "and I received the full consideration of Rs. 20,000, when in "fact to the knowledge of the said Syal we only received "Rs. 10,800." The matter came before the judge on June 11, 1948, and he ordered that if the sum of 1,800*l.* (such sum being in part the equivalent sterling value of the judgment debt, the balance being a security for costs), was paid into court by the defendants within fourteen days from the date of the order, an issue should be tried, and that failing the payment into court of the sum specified within fourteen days the appeal should be dismissed with costs. The defendants appealed from that part of the order which imposed the condition of payment into court as a term of directing the trial of an issue, and the plaintiff cross-appealed from the reversal by Jones J. of the master's order refusing to direct the trial of an issue.

---

(1) Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4, sub-s. 1: "On an application "in that behalf duly made by any "party against whom a registered "judgment may be enforced, the "registration of the judgment— "(*a*) shall be set aside if the "registering court is satisfied— ". . . . (iv.) that the judgment "was obtained by fraud . . . ."

H. C. Leon for the defendants. The judge was right in reversing the order of the master refusing to direct an issue to be tried since it is submitted that the affidavits of the defendants established a prima facie case of fraud which they were entitled to have tried. He was wrong, however, in imposing the term that the full amount claimed and a sum as security for costs, should be paid into court as a condition of directing the issue, since no power exists which entitled him to do so. Notwithstanding this, the defendants are prepared, as was stated to the judge, to bring into court the sum of Rs. 10,800 in respect of which they admitted liability.

Dingle Foot for the plaintiff. The application by the defendants to set aside the registration of the judgment in this case is wholly misconceived. Having failed to defend the action in the foreign court, they are now endeavouring to have the matter tried in this country although they took no steps to appeal from the judgment, and it was only when the plaintiff sought to register the judgment in this country, that

C. A.
1948

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, *In re.* Syal *v.* Heyward.

any question regarding the real consideration for the promissory note was raised. The Act of 1933 was the first legislative enactment dealing with the question here at issue and it made no difference in the law, merely putting into legislative form what was the existing law. It is agreed that the fraud envisaged in the Act on which the registration of a judgment may be set aside must be a fraud on the court, and precisely the same tests must be applied whether the judgment sought to be set aside is the judgment of an English court or a foreign judgment (see per Lindley L.J., *Vadala* v. *Lawes* (1)). The next proposition applicable is that the fraud on which the judgment is sought to be set aside must be one which has been discovered since the date of the judgment (see *Boswell* v. *Coaks* (*No.* 2) (2), *Birch* v. *Birch* (3)). In the present case it is quite clear that all the matters which the defendants are now seeking to raise were known to them at the time of the hearing by the Indian court, and they are seeking to raise here a defence which they could have raised in India (see *Abouloff* v. *Oppenheimer* (4)). Further, it is submitted that there was no fraud on the court. When a debt is incurred, and some part of it is paid back, which is substantially what happened here, the mere fact that the creditor sues for the whole amount and issues a statement of claim for that amount, without revealing that some part of the money has been repaid, falls a long way short of being a fraud on the court. When an application is made to the court to direct the trial of an issue, the court is not bound to make an order, the power to do so is discretionary, but in the present, as in every other case in which a discretionary power is given, that discretion may be exercised on terms (see R. S. C. Or. 27, r. 15; *Richardson* v. *Howell* (5), *Wyatt* v. *Palmer* (6)).

H. C. Leon in reply.

[Cohen L.J. The only question on which the court desires further argument is on the power of the judge to impose terms as a condition of directing an issue.]

The court has only a limited discretion with regard to directing an issue. If there is a case to be tried it must exercise its right to do so and there is no power under the Act or rules which enables it to impose terms.

---

(1) (1890) 25 Q. B. D. 310, 319.
(2) Reported in footnote to *Birch* v. *Birch* (1894) 86 L. T. 365.
(3) [1902] P. 130.
(4) (1883) 10 Q. B. D. 295.
(5) (1892) 8 T. L. R. 445.
(6) [1899] 2 Q. B. 106.

At the conclusion of the arguments the court stated that the appeal of the plaintiff would be dismissed and that on the defendants' appeal, the order of Jones J. would be varied by directing an issue subject to the defendants bringing into court the sterling equivalent of Rs. 10,800 as offered by them. The court would give the reasons for its decision at a later date.

July 29. The judgment of the court was read by COHEN L.J.: As the plaintiff's appeal, if successful, would dispose of the whole matter, it will be convenient to deal with it first.

Mr. Foot, in his able argument, submitted that: (1.) The fraud contemplated by s. 4 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, is fraud on the court. Unless the court has been deceived, the section is not applicable. (2.) An application under s. 4 should be treated in the same way as, before the Act of 1933 came into force, an action to set aside a judgment would have been treated. (3.) Precisely the same tests apply whether the judgment sought to be set aside is a foreign judgment or an English judgment. (4.) Where judgment is sought to be set aside on the ground of fraud, the fraud must have been discovered by the applicants since the date of the judgment. (5.) It was plain that the facts relied on in the present case were all known to the defendants before the date of the Indian judgment.

Mr. Leon agreed with the first of these propositions and he did not, we think, dispute the second. The third is supported by the observations of Lindley L.J. in *Vadala* v. *Lawes* (1), where he said: " First of all, there is the rule which is perfectly " well established and well known, that a party to an action " can impeach the judgment in it for fraud. Whether it is " the judgment of an English court or of a foreign court does " not matter; using general language, that is a general " proposition unconditional and undisputed." It is unnecessary for us on this appeal to consider how far those observations go.

The fifth proposition is also plainly correct if Mr. Foot means only that the defendants knew they were being sued for a sum in excess of Rs. 10,800 and that in the plaint, verified by affidavit, the plaintiff was alleging that they had borrowed Rs. 20,000, but there is no evidence that they knew that the plaint so verified would be the only evidence before the court if in fact that was the position.

---

(1) 25 Q. B. D. 310, 316.

C. A.
1948

THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933, *In re.* SYAL *v.* HEYWARD.

Be that as it may, Mr. Foot's real difficulty is in his fourth proposition. For it he relied on *Boswell* v. *Coaks* (*No.* 2) (1), a decision of the House of Lords applied in *Birch* v. *Birch* (2). These cases, no doubt, establish that in proceedings to set aside an English judgment, the defendants cannot ask for a re-trial of the issue of fraud as between them and the plaintiff on facts known to them at the date of the earlier judgment; but in cases under s. 4 of the Act of 1933, the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding on us, that if the defendant shows a prima facie case that the court was deceived, he is entitled to have that issue tried even though in trying it the court may have to go into defences which could have been raised at the first trial. See *Aboulof* v. *Oppenheimer* (3), as explained in *Vadala* v. *Lawes* (4), where Lindley L.J. immediately after the passage we have already cited, says: "Another general proposition which, "speaking in equally general language, is perfectly well "settled, is, that when you bring an action on a foreign "judgment, you cannot go into the merits which have been "tried in the foreign court. But you have to combine those "two rules and apply them in the case where you cannot go "into the alleged fraud without going into the merits. Which "rule is to prevail? That point appears to me to have been "one of very great difficulty before the case of *Abouloff* v. "*Oppenheimer* (3). At the time when that case was decided, "namely, in 1882, there was a long line of authorities including "*Bank of Australasia* v. *Niass* (5), *Ochsenbein* v. *Papelier* (6) "and *Cammell* v. *Sewell* (7), all recognizing and enforcing the "general proposition, that in an action on a foreign judgment "you cannot re-try the merits. But until *Abouloff's* case (3) "the difficulty of combining the two rules and saying what "ought to be done where you could not enter into the question "of fraud to prove it without reopening the merits, had never "come forward for explicit decision. That point was raised "directly in the case of *Abouloff* v. *Oppenheimer* (3), and it "was decided. I cannot fritter away that judgment, and "I cannot read the judgments without seeing that they "amount to this: that if the fraud upon the foreign court

---

(1) 86 L. T. 365 (footnote)
(2) [1902] P. 130.
(3) 10 Q. B. D. 295.
(4) 25 Q. B. D. 310, 316.
(5) (1851) 16 Q. B. 717.
(6) (1873) L. R. 8 Ch. 695.
(7) (1860) 5 H. & N. 728.

C. A.

1948

THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933, *In re*. SYAL *v.* HEYWARD.

"consists in the fact that the plaintiff has induced that court "by fraud to come to a wrong conclusion, you can reopen "the whole case even although you will have in this court to "go into the very facts which were investigated, and which "were in issue in the foreign court. The technical objection "that the issue is the same is technically answered by the "technical reply that the issue is not the same, because in "this court you have to consider whether the foreign court "has been imposed upon. That, to my mind, is only meeting "technical argument by a technical answer, and I do not "attach much importance to it; but in that case the court "faced the difficulty that you could not give effect to the "defence without re-trying the merits. The fraud practised "on the court, or alleged to have been practised on the court, "was the misleading of the court by evidence known by the "plaintiff to be false. That was the whole fraud. The "question of fact, whether what the plaintiff had said in the "court below was or was not false, was the very question of "fact that had been adjudicated on in the foreign court; and, "notwithstanding that was so, when the court came to "consider how the two rules, to which I have alluded, could be "worked together, they said: 'Well, if that foreign judgment "'was obtained fraudulently, and if it is necessary, in order "'to prove that fraud, to re-try the merits, you are entitled "'to do so according to the law of this country.' I cannot "read that case in any other way."

In the present case it is plain that the defendants are alleging a fraud on the court and it is, therefore, immaterial that to establish their allegation they will have to adduce evidence which was available to them before the date of the Indian judgment.

As a subsidiary point, Mr. Foot contended that the defendants had failed to establish a prima facie case of fraud. We are unable to accede to this argument. It may well be that the plaintiff will rebut that prima facie case, but we think that the evidence filed by the defendants discloses sufficient evidence of a case to entitle them to an issue.

We turn therefore to the defendants' appeal. Mr. Leon argued that under the Act and the rules, the court had no power to impose as a condition of directing an issue that the defendants should bring money into court. In our opinion this contention is well founded. Neither the Act nor the rules in terms confer such a power. In this respect the

C. A.
1948

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, *In re.*
Syal *v.* Heyward.

contrast with Or. 14, r. 6, and with Or. 27, r. 15, both of which expressly empower the court to impose terms as a condition, in the first case of giving leave to defend under Or. 14, and in the second case of setting aside a judgment, is marked. In proceedings under the Act of 1933, the court is not bound to direct an issue. It should not do so unless in the case of an application based on an allegation of fraud, it is satisfied that a prima facie case of fraud on the court is established. But if it is so satisfied, we can see no justification for such an order as Jones J. has made in this case. In this connexion it is not immaterial to observe that in a proper case the court may require security from a plaintiff seeking to enforce his judgment. (See s. 3, sub-s. 1 (*a*) of the Act, and Or. 41B, r. 3.)

It is to be observed that under the rule the plaintiff may be ordered to find security to include the cost of proceedings to set aside the registration. For these reasons at the conclusion of the hearing, we dismissed the plaintiff's cross-appeal and varied the order of Jones J. in the manner asked for by the defendants, namely, by directing an issue subject only to the defendants bringing into court 810*l.*, the agreed sterling equivalent of Rs. 10,800, an offer they had made in the court below and repeated in this court.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the defendants: *Herbert Oppenheimer, Nathan & Vandyk.*

Solicitors for the plaintiff: *A. L. Bryden & Co.*

P. B. D.

1948
July 29.

Lord Goddard C.J., Singleton and Denning JJ.

CHAPMAN *v.* KIRKE.

Stage carriage—Electric tram car—Driving offence—" Wanton and furious " driving "—Negligence—Injury by driver to property of owner of stage carriage—Stage Carriages Act, 1832 (2 & 3 *Wm.* 4, *c.* 120), *ss.* 5, 48.

By s. 48 of the Stage Carriages Act, 1832, " If the driver . . . . " of any stage carriage . . . . shall, through intoxication or " negligence, or by wanton and furious driving, or by or through " any other misconduct . . . . injure or endanger the property "of the owner or proprietor of such stage carriage or of any "other person . . . ." he shall be liable to a penalty. The driver of an electric tram car, while proceeding at a reasonable speed, negligently failed to apply his brakes sufficiently soon to prevent the tram car from colliding with a vehicle in front of it, with the result that damage was done to the tram car.

Held: (1.) That the tram car being a vehicle which proceeded from stage to stage at regular, or more or less regular, intervals and carried passengers who paid separate fares was a stage carriage within the meaning of the Stage Carriages Act, 1832, and, (2.) That under s. 48 of the Act, wanton and furious driving was not the only offence of which the driver could be convicted in relation to the driving of the tram car, and if he injured the property of the owners of the car by negligent driving he was liable to a penalty, notwithstanding that such negligence did not amount to wanton and furious driving.

CASE STATED by the stipendiary magistrate for Bradford.

An information was preferred by the respondent P. A. Kirke, a police sergeant against the appellant, A. Chapman, "for "that he, on or about January 31 in the city of Bradford, "being the driver of a certain stage carriage, to wit, tram car "No. 255 . . . . did through negligence unlawfully injure "the property of the owners of the said carriage, contrary to "s. 48 of the Stage Carriages Act, 1832" (1). It was proved or

---

(1) Stage Carriages Act, 1832, s. 5: "And be it enacted, that "every carriage used or employed "for the purpose of conveying "passengers for hire to or from "any place in Great Britain, and "which, when passing along any "highway or other road, shall "travel at the rate of three miles "or more in the hour, shall, without regard to the form or construction thereof, be deemed and "taken to be a stage carriage "within the meaning of this Act; "provided that the passengers, or "any one or more of them, thereby "conveyed, shall be charged or "shall pay separate and distinct "fares or a separate and distinct "fare . . . . for their respective "places or seats or his place or "seat therein or conveyance "thereby; and in all proceedings "at law or otherwise, and upon all "occasions whatsoever, it shall be "sufficient to describe any carriage "used or employed as aforesaid "by the term 'stage carriage,' "without further or otherwise "describing the same: provided "always that the said term 'stage "'carriage' shall not be deemed "to extend to or to include any "carriage used or employed as "aforesaid wholly upon any railway, nor to any carriage drawn "or impelled by the power of "steam, or otherwise than by "animal power."

Section 48: "And be it enacted, "that if the driver or conductor "or guard of any stage carriage ". . . . shall, through intoxication "or negligence, or by wanton and "furious driving, or by or through "any other misconduct, endanger "the safety of any passenger or "other person, or shall injure or

1948

CHAPMAN
v.
KIRKE.

admitted before the magistrate that on January 31, 1948, the appellant was driving an electric tram car, the property of the Bradford Corporation Passenger Transport Department, along Leeds Road, following a three-ton motor lorry. Both vehicles were proceeding at a pace of from ten to fifteen miles an hour. On approaching the entrance to Thornberry Street, the driver of the motor lorry slowed down and began to turn to the left, and then stopped to allow a third vehicle to pass. The driver gave no signal of his intention to turn and stop. When the lorry stopped, the tram car was approximately 15 yards behind it and owing to the appellant's failure to apply his brakes properly, he did not pull up in time to avoid a collision and the front of the tram car struck the rear of the lorry with the result that the front panel of the tram car was injured and the driver's window broken. It was contended for the appellant before the magistrate: (1.) that the tram car was not a stage carriage within the meaning of the Stage Carriages Act, 1832. Section 5 of the Act, which contained the definition of a stage carriage, was repealed by the Revenue Act, 1869, and there was therefore no definition of a stage carriage for the purposes of the Act, outside the Metropolitan area: (2.) Alternatively, the court was bound by the definition contained in s. 5 of the Act of 1832, which was restricted to horse-drawn vehicles: (3.) The driving offence in s. 48 was "wanton and furious driving" and the term "negligence" in the context of the section did not relate to the manner in which the stage carriage was driven. If the section was applicable, the appellant should have been charged with wanton and furious driving. There was no evidence of this and he should, therefore, be acquitted.

It was contended for the respondent: (1.) That the tram car was a stage carriage within the ordinary meaning of the phrase, since it travelled in stages: and there being no special definition extant under the Stage Carriages Act, 1832, the ordinary meaning of the term stage carriage must be applied. (2.) "Negligence" in s. 48 of the Act was not restricted to acts of negligence unconnected with the manner in which the stage carriage was driven, but could be applied to negligent driving of a degree less serious than that which would justify a conviction for wanton and furious driving. The magistrate held that an electric tram car was a stage carriage within the

---

"endanger the property of the "owner or proprietor of such "carriage or of any other person, "every such person so offending "shall forfeit five pounds."

meaning of the Act of 1832; that the appellant had driven the tram car with a lack of care and skill which amounted to negligence, but did not amount to wanton and furious driving, and, (3.) that there being nothing in s. 48 of the Act to limit the application of the term negligence, it could be applied to the manner in which the stage carriage was being driven. He accordingly found the appellant guilty and fined him 1*l*. The appellant appealed.

M. R. Nicholas for the appellant.
G. Norman Black for the respondent.

LORD GODDARD C.J. In this case it appears that the magistrate came to the conclusion that the appellant had been guilty of negligence in not applying his brakes soon enough to prevent a collision with a lorry which was in front of him. We are not concerned with the question whether there was negligence, that being a matter entirely for the magistrate. The two points which have been argued before us are, firstly, whether or not the tram car was a stage carriage and, secondly, whether when an offence under s. 48 of the Stage Carriages Act, 1832, in relation to the driving of a stage carriage, is alleged against the driver, that offence must amount to one of wanton and furious driving. The Act under which the appellant was charged is 2 & 3 William 4, cap. 120, which was passed in the year 1832, and it is to be noticed that some parts of the Act deal with certain duties which were granted to the Crown in respect of carriages. Section 5 of the Act contained a definition of a stage carriage which was, no doubt, necessary at the time when the Act was passed, having regard to the provisions relating to the taxes on carriages to which I have referred. That section was repealed by the Customs and Inland Revenue Duties Act, 1869, which dealt with the duties relating to carriages, but s. 48 of the Act of 1832 was not repealed and, consequently, it still remains an offence if the driver of a stage carriage does certain things which are specified in that section. It is contended for the appellant that as the definition in s. 5 has been repealed, a man cannot be prosecuted as the driver of a stage carriage, because there is no means of showing what the term includes apart from those vehicles which were stage carriages in the year 1832, at which time, of course, electric tram cars had not been invented. I do not think that that is a sound argument. As s. 48 of the Act of

1832 has been left on the statute book, in my opinion, the court must approach the interpretation of it without the assistance of the definition which was provided in s. 5. It is, therefore, necessary to ascertain whether, apart from the definition, the vehicle in question is a stage carriage. It seems to me clear from the case of *Reg.* v. *Ruscoe* (1), which was decided in 1838, that the courts in those days knew perfectly well what a stage carriage was. All the judgments show that the expression was one in regard to which the court did not require any particular assistance to help them to define it. They knew what a stage carriage was in just the same way in which the court is taken to know the meaning of any other ordinary expression in the English language, though it is not uninteresting to observe that in the argument the definition of "stage "carriage" given in Dr. Johnson's dictionary was cited. Dr. Johnson died a good many years before 1838, so it is clear that in his day, the expression stage carriage was known, since he defined it in his dictionary. In my opinion, there is no doubt that a vehicle which proceeds from stage to stage at regular, or more or less regular intervals, and carries passengers who pay separate fares, is a stage coach or a stage carriage, whichever expression is preferred. On the first point raised, therefore, it was merely a matter for the magistrate to inquire whether the vehicle which the appellant was driving was one which could properly be described as a stage carriage, and without going into an elaborate research and discussion of the matter, I think the case on this point is concluded by *Reg.* v. *Ruscoe* (1) which shows that the expression "stage carriage" is one which was known to the common law.

The second point relied on by the appellant was this: it is said that as "wanton and furious driving" is expressly mentioned in s. 48, the appellant could not be convicted of anything in relation to the driving of the tram car unless his driving of it amounted to "wanton and furious driving." The words of the section, however, seem to me to be clear. They are "if the driver or conductor or guard of any stage "carriage . . . . shall, through intoxication, or negligence, "or by or through any other misconduct, endanger the safety "of any passenger or other person, or shall injure or endanger "the property of the owner or proprietor of such stage carriage "or of any other person, every such person so offending "shall forfeit five pounds." If it is found that the driver of the

(1) (1838) 8 A. & E. 386.

vehicle injured the property of his master through negligence and there was evidence on which the magistrate could so find, we cannot say that negligent driving is excluded, and that as the offence is a driving offence, wanton or furious driving must be proved. That being so, in my opinion, the magistrate had power to impose a penalty if he found that the driver was guilty of negligence and had thereby caused injury to his master's vehicle. The appeal must, therefore, be dismissed.

SINGLETON J. I agree.

DENNING J. I also agree. I do not wish it to be supposed that when a section of an Act has been repealed, it cannot afterwards be looked at in connexion with other provisions in the Act. I regard s. 5 of the Act of 1832 as putting artificial limitations or restrictions on what would otherwise be a stage carriage. The effect of the Act of 1869 was, designedly, to remove those artificial limitations or restrictions, leaving the term "stage carriage," in its full scope, sufficiently wide to cover this case.

Appeal dismissed.

Solicitors for the appellant: *Pattinson & Brewer, for A. V. Hammond & Co., Bradford.*

Solicitors for the respondent: *Torr & Co., for W. H. Leathem, Bradford.*

P. B. D.

REX *v.* WINCHESTER AREA ASSESSMENT COMMITTEE. *Ex parte* WRIGHT.

C. A.
1948
June 9, 10;
July 19.
Scott and Asquith L.JJ. and Romer J.

Rating—Amendment of valuation list—Proposal—Sufficiency of grounds stated—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37 *sub-s.* 2 (*b*).

Section 37, sub-s. 2 (*b*) of the Rating and Valuation Act, 1925, provides that a proposal for the amendment of a valuation list must "specify the grounds on which the proposed amendment is supported."

It must appear from such a proposal (i.) whether an increase or decrease is asked for (ii.) to which of the existing valuations in

C. A.
1948

REX
v.
WINCHESTER
AREA
ASSESSMENT
COMMITTEE.
Ex parte
WRIGHT.

the list the proposal refers, and (iii.) what is the ground of complaint as to the existing valuation. As to (iii.) it is enough to state "incorrect or unfair" unless there is some unusual ground, in which case it ought to be specified.

A proposal by a rating authority to increase the assessment of two cinemas in a valuation list began with a statement that the authority was aggrieved by the incorrectness or unfairness of that assessment. The schedule set out in detail the existing assessment and the assessment proposed. Against the words "grounds "of proposal," below the schedule, appeared only the words "revised assessments."

Held, that the grounds on which the proposed amendment of the list were supported were sufficiently specified in the proposal.

Bents Brewery Co., Ld. v. *Upper Agbrigg Assessment Committee* [1944] K. B. 524 approved but distinguished.

Decision of Divisional Court reversed.

APPEAL from Divisional Court.

A proposal was sent to the respondent, the occupier of two cinemas, in the following terms :—

"Council of Borough of Eastleigh.

"The above Borough Council, being the rating authority "for the Borough of Eastleigh . . . . being aggrieved by the "incorrectness or unfairness of the valuation and assessment "in the valuation list for the said Borough . . . . do hereby "make the proposal specified in the . . . . schedule.

"Schedule.

" Assessment No.	10050	10051
"	*Geo. W. A. Wright.*	
"	*Regal Cinema*	*Picture House*
"	*Market Street*	*Market Street*
" Present assessment.		
" Gross value	450*l.*	400*l.*
" Rateable value	372*l.*	330*l.*
" Amendment proposed.		
" Gross value	940*l.*	680*l.*
" Rateable value	780*l.*	563*l.*
" Grounds of proposals.	*Revised assessments."*	

The assessment committee of the Winchester Assessment Area decided in favour of the proposal. The respondent applied for an order of certiorari to bring that decision up for quashing on the ground that the proposal was invalid as it did not specify the grounds upon which the proposed amendments were supported as required by s. 37, sub-s. 2 (*b*) of the Rating and Valuation Act, 1925 (1).

The Divisional Court (Lord Goddard C.J., Humphreys and Croom-Johnson JJ.) considering the case covered by *Bents Brewery Co., Ld.* v. *Upper Agbrigg Assessment Committee* (2), made the order applied for.

The assessment committee appealed.

Scott Henderson K.C. and *Ramsay Willis* for the appellants. The only question in the present appeal is whether the proposal sent by the appellants to the respondent complied with s. 37. sub-s. 2 (*b*), of the Rating and Valuation Act, 1925. A proposal satisfies that provision if it specifies in a general way what the proposer wants by way of amendment, e.g., if it shows that an increase or decrease in the assessment is desired or if it states that the valuation list is incorrect. The proposal must be looked at as a whole. In the present proposal the rating authority say, in effect, that the valuation list is unfair or incorrect in respect of the two hereditaments in question in that the assessments are insufficient. By so stating they are giving the ratepayer all the information they are required to give him by sub-s. 2 (*b*). No statutory form is prescribed. It is sufficient for the rating authority to tell the occupier in a general way: "We want your assessment increased because it is "insufficient."

[ASQUITH L.J. The mere fact of making a proposal shows that a proposer is aggrieved. It would seem therefore that "specify" in sub-s. 2 (*b*) must mean something more than that.]

[SCOTT L.J. Sub-section 2 (*b*) seems to me to require the reasons to be specified why the existing assessment is wrong.]

---

(1) Section 37 of the Rating and Valuation Act, 1925, provides: "(1.) Any person (including the "county valuation committee and "any local authority) who is "aggrieved by the incorrectness or "unfairness of any matter in the "valuation list for the time being "in force, or by the inclusion "therein or omission therefrom of "any matter, or by the valuation "as a single hereditament of a "building or a portion of a "building occupied in parts, or "otherwise with respect to the "list, may make in manner "provided by this section a pro-"posal for the amendment of the "list (in this section referred to "as 'a proposal') . . . .

"(2.) Every proposal made "under this section must— . . . . "(*b*) specify the grounds on which "the proposed amendment is "supported."

(2) [1944] K. B. 524.

It is sufficient to make it clear what the grounds of your proposal are. "Grounds" are not reasons. See *Ladies Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee* (1). Parliament could not have intended that there should be anything in the nature of a formal pleading, but merely that the person on whom the proposal was served should know what case he had to meet. Nothing was decided in *The King* v. *West Norfolk Assessment Committee* (2) which applies to the question in the present case. The Court of Appeal there decided that the proposal was not bad, although it omitted figures, and did not apply its mind to the question whether the proposal complied with sub-s. 2 (*b*). Apart from that case there is no authority on the point now in issue which is binding on this court. [*Rex* v. *Thanet Assessment Committee* (3); *Bents Brewery Co., Ld.* v. *Upper Agbrigg Assessment Committee* (4); *Rex* v. *Reading County Borough Assessment Committee* (5) and *Rex* v. *Surrey* (*Mid-Eastern Area*) *Assessment Committee* (6) were also referred to.]

Harold Williams K.C. and *Squibb* for the respondent. The issue is whether the proposal is a valid one or not. In our submission it was invalid because it did not specify the grounds on which the proposed amendment was supported as required by sub-s. 2 (*b*). *The King* v. *West Norfolk Assessment Committee* (2) is not an authority against the respondent because the present point was not argued in that case.

[Scott L.J. How do you distinguish between the grievances, such as "incorrectness or unfairness," referred to in sub-s. 1 of s. 37 and the grounds to be specified by sub-s. 2 (*b*)?]

Sometimes they are identical, e.g., where the rateable value is wrongly calculated from the gross value, sometimes they are not. Thus where a rating authority say that the rateable value is insufficient and ought to be higher that is their grievance. But the grounds of a proposed amendment would not be properly specified by repeating that grievance. They must state the grounds for their grievance. The appellants have chosen to express the grounds of their proposal as "revised "assessments" and they are therefore bound by those grounds. On any view those words cannot be a sufficient specification of the grounds of a proposed amendment. It is true that the appellants stated incidentally in the proposal that they were "aggrieved by the incorrectness or unfairness" of the list. But that statement cannot support the proposed amendment. The mere statement that a condition precedent (under sub-s. 1) to the right to make a proposal has been satisfied does not comply with sub-s. 2. Otherwise why was sub-s. 2 expressed in the language in which it was? The party to whom the proposal is sent should be given some idea of the case against him which he is going to be called upon to meet. The structure of s. 37 of the Act of 1925 is to be contrasted with the structure of s. 18 of the Union Assessment Committee Act, 1862.

---

(1) [1932] 2 K. B. 679.
(2) (1930) 94 J. P. 201.
(3) [1939] 2 K. B. 640.
(4) [1944] K. B. 524.
(5) [1948] W. N. 85; 64 T. L. R. 191.
(6) (1948) 64 T. L. R. 316.

[ROMER J. Under s. 62 "unfairness or incorrectness" is clearly a sufficient ground of objection.]

Yes. But that section refers to "objections" to the list. Until the Act of 1925 a person aggrieved could only appeal against the rate. The Act of 1925 laid down an entirely new procedure by way of "proposal."

[SCOTT L.J. If "unfairness" was a ground of objection in 1862 why is it not one now?]

The language of s. 18 of the Act of 1862 was not so detailed as the language of s. 37 of the Act of 1925. Besides sub-s. 8 of s. 37 makes it clear that an assessment committee must "hear "and determine" a proposal in a judicial manner, see *The King* v. *City of Westminster Assessment Committee* (1), and a proper specification of the grounds of a proposal is now therefore essential. *Rex* v. *Thanet Assessment Committee* (2) is strongly in the respondent's favour.

Scott Henderson K.C. in reply. There is no difference between grounds of objection under s. 18 of the Act of 1862 and grounds of proposal under s. 37 of the Act of 1925. Grounds of objection did not mean reasons of objection, *Gateshead Assessment Committee* v. *Redheugh Colliery, Ld.* (3). The Court of Appeal expressly adopted that decision in respect to proposals in *The King* v. *West Norfolk Assessment Committee* (4). Section 37 is similar to s. 18 both in its wording and in its effect. The change from making an "objection" to making a "proposal" was a change in substance, not a change in form.

Cur. adv. vult.

July 19. SCOTT L.J. It has been judicially recognized that, in passing the Rating and Valuation Act, 1925, it

(1) [1941] 1 K. B. 53.
(2) [1939] 2 K. B. 640.
(3) [1925] A. C. 309.
(4) 94 J. P. 201.

C. A.

1948

REX v. WINCHESTER AREA ASSESSMENT COMMITTEE. *Ex parte* WRIGHT.

Scott L.J.

was the intention of Parliament that an aggrieved person should be able to act upon many of its provisions, including s. 37, without legal assistance. Greer L.J. said in *The King* v. *West Norfolk Assessment Committee* (1): "It is not "intended by the statute that his difficulties should be such "that he would have to go to an expert or to a lawyer to draw up "his proposal." The language of proposals, by whomsoever made, should therefore be read without too much legal strictness; none the less the requirements of sub-ss. 1 and 2 must be substantially satisfied, if the "proposal" is to be effective and valid. Some sort of "specification" of grounds of the proposal is demanded: e.g., it must be clear whether it is an increase or a decrease of the assessment that is proposed—the actual figures need not be stated—but the grounds for proposing a change must be "specified," and that means clearly stated and stated with some definiteness or particularity. On the one hand if an increase or decrease is plainly proposed, it is not necessary to quantify it as the proposer must be presumed to be ready to justify before the assessment committee his resistance to change. On the other hand the proposer must give a reason of sufficient legal validity and relevance to constitute a good ground in law for some increase or decrease, as the case may be, and under that head I think the trend of the decisions is that it will suffice if the proposal makes it clear that, unless the change is made of the valuation of the hereditament with which the proposal is concerned, it will be either "incorrect" or "unfair" within the meaning of those words in rating law.

In *Bents Brewery Co., Ld.* v. *Upper Agbrigg Assessment Committee* (2), the insufficiency of the statement of grounds seemed to the court to be obvious, first because it gave no indication at all of the reasons why an alteration was proposed, the only stated ground being "annual revision" which was meaningless, since the Act of 1925 only called for general revision every five years and, secondly, because there was in the proposal no allegation of unfairness or incorrectness. In my view therefore that case was rightly decided. But the present proposal differs from the proposal in that case in two respects: (i.) it begins with the statement that the rating authority is "aggrieved by the incorrectness or unfairness of the valuation "and assessment of each hereditament in the valuation list," i.e., alternative grounds are there stated, and (ii.) in the space on the form used there appear opposite the words "Grounds of

(1) 94 J. P. 201, 203.

(2) [1944] K. B. 524.

C. A.
1948

REX
v.
WINCHESTER
AREA
ASSESSMENT
COMMITTEE.
Ex parte
WRIGHT.

Scott L.J.

"proposal" the words "*revised assessments.*" Lord Goddard C.J. thought those words were synonymous with, or contained no more information than, the words "annual "revision," put forward as the specification of grounds in the *Bents Brewery* (1) case, but with diffidence I incline to the view that even by themselves they mean rather more than that, as they seem to me to import an intention to ask at the then prospective meeting of the assessment committee for revision, and the schedule makes it clear that it is an upward revision which is proposed. But even if that is too kind a reading of the words taken alone the charge of "incorrectness or unfair-"ness" predicated in the earlier part of the proposal must be read into the ungrammatical phrase "revised assessments." For these reasons apart from authorities, I think that this proposal does satisfy sub-s. 2 (*b*) of s. 37.

It is not necessary to discuss all the cases cited to us, but we have considered them. In *The King* v. *West Norfolk Assessment Committee* (2) the Court of Appeal, consisting of Scrutton L.J., Greer L.J. and Slesser L.J., expressed opinions about s. 37 which (although not all of them were the basis of the decision) are entitled to great respect, and the case did decide that a quantitative statement in the proposal of the figure of increase or decrease is unnecessary. The opinion was expressed that the old practice about objections so far as their reasons were concerned was, so to speak, carried forward into the new provisions about proposals. Greer L.J. took the view (3) which I have already quoted, that because "objections of this "sort most frequently have to be made by the occupier who is "paying a rent for premises" strict requirements about the form in which the proposal was to be expressed could not have been intended by Parliament. That view was I think a mere application of the principles applicable to objections under the old practice as affirmed by the House of Lords in *Gateshead Assessment Committee* v. *Redheugh Colliery, Ld.* (4) see per Viscount Cave L.C., per Viscount Finlay and per Lord Shaw. It should be borne in mind that "unfairness or incorrectness" constituted prima facie a sufficient specification of grounds for objection under s. 18 of the Union Assessment Committee Act, 1862. In *Rex* v. *Thanet and District Assessment Committee* (5) the proposal of the valuation committee was in these terms: "I, the undersigned, on behalf of the Kent

---

(1) [1944] K. B. 524.
(2) 94 J. P. 201.
(3) Ibid. 203.
(4) [1925] A. C. 309, 317, 325, 329.
(5) [1939] 2 K. B. 640.

"County Valuation Committee, which is aggrieved by the "incorrectness of the valuation list of your rating area, "hereby make a proposal for amendment of such list in "respect of the property shown in the schedule hereunder "written, on the ground that the present assessments are "unfair and incorrect." Then followed a description of the applicants' property and its then assessed value and, at the foot of the proposal, under the heading "Amendment "proposed," appeared the words "To such an amount as may "be determined on an approved apportionment of the cumulo "value of the undertaking having regard to the accounts "relating thereto in respect of the year ended December 31, "1937." The Divisional Court held that the last lines of the proposal made it impossible to discover what was proposed, see per Humphreys J. (1): "When I look at this document "which is called a proposal for the amendment of the "list, I find that it gives no information at all as to "what is the answer to the natural question which "would be put by a person to whom such a document "was addressed, 'What is your proposed amendment?' "It appears to me the answer is, 'We are not going to tell "'you for the very good reason that we do not know, but, "'that some proposed amendment is desirable, we maintain.' "In my view, that is quite contrary to the requirement of "sub-s. 2 (*b*) of s. 37, and to the plain meaning and the whole "intention of" the Act. In the present case the schedule is quite explicit as it states precisely the respect and extent in which it is alleged that the existing valuations are incorrect or unfair. In *Rex* v. *Heston and Isleworth Rating Authority* (2) a Divisional Court considered the *West Norfolk* (3) and *Thanet* (4) cases and followed the view expressed by the Court of Appeal in the former, viz., that it is not necessary for the proposer to state in his proposal the precise figure to which the relevant valuation should be reduced or—as the case may be—increased. Then came the *Bents Brewery* case (5) with which I have already dealt. The litigation between the parties in that case came before the Court of Appeal in 1945 (6) but it was on a totally different point and has no bearing on the present appeal. The next case cited to us was *Rex* v. *Reading County Borough Assessment Committee* (7), another decision of a

(1) [1939] 2 K. B. 640, 648.
(2) [1941] 2 K. B. 146.
(3) 94 J. P. 201.
(4) [1939] 2 K. B. 640.
(5) [1944] K. B. 524.
(6) [1945] K. B. 196.
(7) [1948] W. N. 85; 64 T.L.R. 191.

Divisional Court. There the proposal stated the grounds as "existing assessment unfair incorrect and insufficient" but in a column headed "proposed assessment" there appeared opposite the details of the existing valuations only the words "to be amended." The hereditament in that case was partly industrial and partly non-industrial, each part being rated separately. The court held that the added words did not give sufficiently definite information and, treating the case as governed by the *Thanet* decision (1), disallowed the proposal. In *Rex* v. *Surrey (Mid-Eastern Area) Assessment Committee* (2), before a Divisional Court consisting of Goddard C.J., Humphreys J. and Pritchard J. the proposal form gave as grounds "insufficient incorrect and unfair" and, while stating the existing assessment, added "The precise assessment "desired will be notified at a later date." The court held that the proposal was sufficient on the ground that an increase was being asked for and that the other particulars gave sufficient information.

I find it difficult to harmonize all these decisions but state my conclusions thus: the proposal must give sufficient information to enable the assessment committee to know (i.) whether an increase or decrease is asked for (ii.) to which of the existing valuations in the rate book the proposal refers, and (iii.) what is the ground of complaint as to the existing valuation on that head, and it is enough to state "incorrect or "unfair" unless there is some unusual ground, in which case it ought to be specified. The proposal before us satisfies those criteria. There must be judgment accordingly. The appeal will be allowed and the order of certiorari made by the Divisional Court will be rescinded with costs to the applicant here and below.

ASQUITH L.J. I agree with the judgment delivered by SCOTT L.J. It is true that the only words appearing in the proposal in the space opposite the words "Grounds of proposal" are "revised assessments." If the actual grounds had to be sought in this space exclusively, the words "revised assessments" would, in my view, have been plainly insufficient. To say: "My assessments ought to be revised because they "ought to be revised," is not to state any ground for their revision. But it has been laid down emphatically that a proposal need not be a strict or formal document and I think

---

(1) [1939] 2 K. B. 640.

(2) 64 T. L. R. 316.

C. A.
1948
REX
v.
WINCHESTER
AREA
ASSESS-
MENT
COMMITTEE.
Ex parte
WRIGHT.

statements contained in parts of the proposal other than the space opposite "grounds of proposal" can be prayed in aid to eke out insufficiency at that point. With these supplementary materials admitted I agree with SCOTT L.J. that the rather exacting criteria laid down in the cases are satisfied and that the appeal should be allowed.

SCOTT L.J. ROMER J. desires me to state that he agrees with the two judgments delivered.

Appeal allowed.

Solicitors for the appellants: *J. J. McIntyre for G. H. Gardner, Winchester and J. C. Gardner, Eastleigh.*

Solicitors for the respondent: *Lovell Son & Pitfield, for Paris, Smith & Randall, Southampton.*

R. P. C.

Affirmed. C.A. [1949] 1 All E.R. 312.

1948
June 14, 15.
Slade J.

ALLIANCE PROPERTY COMPANY, LIMITED *v.* SHAFFER.

Landlord and tenant—Rent restriction—Standard rent—"Rent"—Rent reserved by lease—Additional payments reserved by supplemental agreement—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*).

A flat was let by the plaintiffs to the defendant in 1944. The rent reserved by the lease was admittedly higher than that allowed by the Rent Restriction Acts. By a lease dated May 31, 1934, the plaintiffs had previously let the flat to one D at a rent of 175*l.* per annum. Later that day D and the plaintiffs had executed a second deed under which D covenanted to pay a further 100*l.* per annum to the plaintiffs, of which 40*l.* was in consideration of alterations which the plaintiffs had made to the premises, and 60*l.* was payable towards the cost of the management of the building. The second deed was described on the back as a supplemental agreement; it provided that it was to run concurrently with the lease and that amounts payable under it were to be recoverable by distress or otherwise as for rent in arrear. On September 1, 1939, the material date for ascertaining the standard rent, D was tenant of the flat under a yearly tenancy in substitution of that original tenancy, but on the same terms and conditions. The plaintiffs claimed arrears of rent from the defendant, the present tenant, on the footing that the standard rent was 275*l.* per annum, and the defendant counterclaimed rent overpaid on the footing that the standard rent was 175*l*. per annum.

Held, that the additional 100*l*. per annum reserved under the second deed of May 31, 1934 was part of the " rent " within the meaning of s. 12, sub-s. 1 (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that the standard rent of the flat was therefore 275*l*. per annum.

ACTION.

By a lease dated May 31, 1934, the plaintiffs let an unfurnished flat in Weymouth Court, London, to one Reginald Denham for seven years, subject to provisions for an earlier determination by notice, from June 24, 1934, at a rent of 175*l*. per annum. There was a proviso for re-entry should the rent be in arrear or unpaid.

Later the same day another deed (described on the back as a supplemental agreement) was executed by Denham and by the plaintiffs, reciting that the lessors (the plaintiffs) had that day granted a lease of the flat to the lessee (Denham), that the lessors had made considerable decorative and other alterations to the premises and that it had been agreed by the parties that, in consideration thereof the lessor should contribute 40*l*. per annum during the period of his lease towards the cost of those alterations, in addition to the sum of 60*l*. per annum towards the cost of the management of the building. The operative part of this deed provided : " (1.) The " lessee shall pay to the lessor the sum of 25*l*. [per quarter] " during the period of his lease together with and as the rent " reserved by the said lease becomes due. (2.) This agreement " shall run concurrently with the said lease and shall be deemed " at an end as and when the said lease is terminated. (3.) All " amounts payable hereunder shall be recoverable by distress " or otherwise as for rent in arrear." Then there followed a provision in the deed that the agreement should be binding on the person or persons in whom the lease was vested at any time.

On May 18, 1937, the plaintiffs wrote to Denham in reply to a letter from him : " We are in receipt of your letter of " May 17 and note that you desire to remain in the above " flat on a yearly tenancy as and from June 24, 1937 on the " same terms and conditions as your present tenancy. To " this we are agreeable . . . ." That yearly tenancy was still in existence on September 1, 1939.

By s. 3 of the Rent and Mortgage Interest Restrictions

Act, 1939, the Rent Restriction Acts became applicable to the flat.

After Denham's tenancy had determined the plaintiffs let the flat to the defendant, Bernard Shaffer, by a lease dated May 23, 1944, for three years from June 7, 1944, at a rent expressed to be 300*l*. per annum. By a memorandum endorsed on that lease dated May 7, 1947, the parties agreed to extend the term of that lease for a further seven years, on the terms that the rent was to be increased to 325*l*. per annum.

The plaintiffs, while conceding that the rents of 300*l*. per annum reserved under the lease of May 23, 1944, and 325*l*. per annum reserved by the endorsement were irrecoverable under the Rent Restriction Acts, contended that the "standard rent" of the flat under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1) was 275*l*. per annum, and claimed arrears of rent on that footing. The defendant, contending that the standard rent was 175*l*. per annum, counterclaimed for the return of rent overpaid.

L. A. Blundell for the plaintiffs. The word "rent" in s. 12 of the Act of 1920 has a meaning sufficiently wide to cover the additional payments reserved under the second deed. The Court of Appeal decided in *Property Holding Co., Ld.* v. *Clark* (2) that the word "rent" in s. 12, sub-s. 1 (*a*), had a meaning sufficiently wide to cover a similar additional payment, and that decision governs the present case. [He referred also to *L. H. Woods & Co., Ld.* v. *City & West End Properties, Ld.* (3).] *Property Holding Co., Ld.* v. *Clark* (2) can only be distinguished from the present case in that here there are two documents instead of one. But that can make no difference in principle. The fact that the terms of a letting are to be found in more than one document cannot affect the legal result of those terms. The real substance of the transaction was

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*) as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1, and sch. I.: "The expression 'standard rent' means "the rent at which the dwelling-"house was let on September 1, "1939, or, where the dwelling-"house was not let on that date, "the rent at which it was last let "before that date, or, in the case "of a dwelling-house which was "first let after the said Septem-"ber 1, the rent at which it was "first let."

Section 12, sub-s. 2, proviso (i.): "This Act shall not, save as "otherwise expressly provided, "apply to a dwelling-house bona "fide let at a rent which includes "payments in respect of board, "attendance, or use of furniture."

(2) [1948] 1 K. B. 630.

(3) (1921) 38 T. L. R. 98.

a letting at 275*l.* per annum. In considering what is to be included in the "rent" within the meaning of s. 12 of the Act of 1920 one must look at the substance of the letting and not at the form. It is the sum actually payable by the tenant on September 1, 1939, that matters, *Bryanston Property Co., Ld.* v. *Edwards* (1). In that case Lord Greene M.R. said (2) that in applying an Act like the Rent Restriction Act to a tenancy agreement too much attention should not be paid to technical argument. [He also referred to *Wilkes* v. *Goodwin* (3), *Artillery Mansions Ld.* v. *Mabarteney* (4) and *Samuel* v. *Salmon & Gluckstein, Ld.* (5).] The second deed can only be read as being supplemental to the first. They can only be read together as parts of the same transaction, *Harman* v. *Richards* (6), *Smith* v. *Chadwick* (7). That transaction was the letting, and the total rent reserved under that letting was 275*l.*

Michael Hoare for the defendants. The additional payments under the second deed were not part of the "rent" within the meaning of that word in s. 12 of the Act of 1920. In *Property Holding Co., Ld.* v. *Clark* (8) the Court of Appeal upheld my submissions (9) (i.) that the word "rent" in s. 12 of the Act meant the same thing both in sub-s. 1 and in sub-s. 2 of that section, and (ii.) that that word meant, in that section, the total payment under the instrument of letting. But in order to ascertain the rent one can only look at the instrument of letting. Where premises are let under a self-contained lease or tenancy agreement one cannot look outside that document, *Ellen* v. *Goldstein* (10); *White* v. *Richmond Court, Ld.* (11). In the latter case payments reserved in a supplemental agreement executed after the execution of a lease were held not to constitute part of the rent. Furthermore payments reserved by an agreement collateral to the tenancy agreement are not part of the consideration for the demise of the land and they cannot therefore form part of the rent, whether the collateral agreement is contained in the same document as the tenancy agreement or not. In the present case the second deed was

(1) [1944] K. B. 32.
(2) Ibid. p. 36.
(3) [1923] 2 K. B. 86.
(4) [1947] K. B. 594.
(5) [1946] Ch. 8.
(6) (1852) 10 Hare 81.
(7) (1882) 20 Ch. D. 27.
(8) [1948] 1 K. B. 630.
(9) Ibid. 632.
(10) (1920) 123 L. T. 644.
(11) [1944] K. B. 576.

collateral to the lease, *Angell* v. *Duke* (1). The second deed was not part of the tenancy (i.) because it was executed after the lease and contained in a separate document, and (ii.) because it was collateral to the lease. *Property Holding Co.* v. *Clark* (2) is distinguishable on both those grounds.

The landlords, having fixed the rent at 175*l.* in the lease for their own purposes, cannot now seek the assistance of the court to establish that that was not the real consideration for the demise and that the rent was in fact 275*l.* [He then referred to *Alexander* v. *Rayson* (3).]

The letter of May 18, 1937, from the plaintiffs to Denham operated as a surrender of the existing tenancy. That put an end to the first deed. It therefore put an end to the second deed also because by operative cl. 2 of that deed it was to be deemed to be at an end when the first deed was terminated. The second deed cannot therefore be relevant in considering the rent on September 1, 1939, even if it was part of the original letting, which it was not.

Blundell in reply. *White* v. *Richmond Court, Ld.* (4) is distinguishable from the present case. In that case the flat was first let after September 1, 1939. The standard rent therefore, under s. 12, sub-s. 1 (*a*) was " the rent at which it was first let," and not " the rent at which [it] was let on September 1, 1939," as in the present case. The Court of Appeal held that as the flat was first let by a self-contained lease which fixed the rent at 200*l.* per annum, that was the rent at which it was first let, and the fact that that rent was subsequently reduced could not affect the standard rent. In the present case the question is not, " What was the rent when the flat was first " let ? " but, " What was the rent on September 1, 1939 ? "

It is true that the original tenancy was terminated by the letter of May 18, 1937, but that tenancy was superseded by a yearly tenancy on the same terms and conditions, and that yearly tenancy was still in existence on September 1, 1939. The terms of the original tenancy are therefore the terms which it is necessary to consider in order to ascertain the standard rent.

Slade J. It is agreed between the parties that the question, and the only question, that I have to determine is whether the

(1) (1875) L. R. 10 Q. B. 174.
(2) [1948] 1 K. B. 630.
(3) [1936] 1 K. B. 169.
(4) [1944] K. B. 576.

standard rent of the flat is 275*l.* per annum or whether it is 175*l.* per annum.

In order to ascertain the standard rent of the flat I have to look at sub-s. 1 (*a*) of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by sch. I. to the Rent and Mortgage Interest Restrictions Act, 1939. By that sub-section the expression "standard rent" means "the rent at which the dwelling-house was let on the "September 1, 1939 . . .". Both parties agree that the flat was let on September 1, 1939, and, therefore, the rent at which it was let at that date is its standard rent. The standard rent of the flat depends therefore upon the two deeds which were executed by the plaintiffs in letting it to Reginald Denham on May 31, 1934.

The first question which arises in construing sub-s. 1 (*a*) of s. 12 is: "What is included in the word 'rent'?" Upon that there have been a number of decisions. There have also been a number of decisions upon the meaning of the word "rent" in sub-s. 2, proviso (i.) of s. 12. That proviso has been used in some of the cases for the purpose of showing that a rent which may include payments in respect of board, attendance or the use of furniture cannot be limited in its meaning to the old common law word "rent," as it may include elements which would not be included in the old common law meaning of the word.

Except for one circumstance *Property Holding Co., Ld.* v. *Clark* (1), a decision of the Court of Appeal, appears to me to be substantially on all fours with the facts of the present case. That also was a case upon sub-s. 1 (*a*) of s. 12, and I understand it to lay down at least two principles. It decides first that the term "rent" in the context "standard rent" carries a meaning sufficiently wide to cover additional payments, whether or not some of the benefits to the tenant to which the additional payment is attributable have already been expressly or impliedly included in the main grant, and secondly that a covenant to pay a sum of money, an additional sum or just an amount, may be a covenant to pay rent for the purposes of the definition of "standard rent" although that sum is not described in the agreement as rent. It is unnecessary to decide whether a payment which could not be expressly enforced by such remedies as distress would be a payment which could be construed as being rent, because in the present case the second deed of May 31, 1934, expressly provides that the 100*l.*—that is the aggregate of the 60*l.* and the 40*l.*—shall be recoverable by distress or otherwise as for rent in arrear. It is unnecessary also to decide whether the additional payment, even though described as rent, would constitute rent for the purposes of the definition if it was clear from the agreement that it related to something which did not really touch or concern the demised premises at all. For example if it were a payment—to use an illustration given by Evershed L.J. in *Property Holding Co., Ld.* v. *Clark* (1)—by the tenant for the use of a garage belonging to the landlord which was not included in the demise. In my judgment both the matters for which the extra sums of 40*l.* and 60*l.* a year are made payable do touch and concern the demised premises. The first one is a payment in respect of decorations and alterations to the demised premises themselves, and the second one is a payment towards the cost of the management of the building of which the demised premises form part, and the benefit of such management accrues to the tenant by virtue of his occupation of the demised premises. Except that in *Property Holding Co., Ld.* v. *Clark* (1) the rent and the additional payment were both contained in one document, whereas in the present case the 175*l.* and the 100*l.* are in two separate documents, the decision in that case appears to me to have turned on precisely the points which arise in this case and I am of course bound by that decision.

---

(1) [1948] 1 K. B. 630.

The question therefore which arises is whether the fact that the rights of the parties in this case depend on the two documents which were executed by the plaintiffs and Reginald Denham in 1934 distinguishes this case in law from the decision in *Property Holding Co., Ld.* v. *Clark* (1). Before I deal with that question I must refer to *White* v. *Richmond Court, Ld.* (2), also a decision of the Court of Appeal, which Mr. Hoare cited to me and on which he relied. That also was a case under sub-s. 1 (*a*) of s. 12, but with the important distinction that there the premises had never been let prior to September 1, 1939 and, therefore, the method of ascertaining the standard rent was by reference to later words in the sub-section which are in these terms: " or, in the case " of a dwelling-house which was first let after the said " September 1, the rent at which it was first let," that is to say, the rent at which the premises were first let after

(1) [1948] 1 K. B. 630, 649, 650.

(2) [1944] K. B. 576.

1948

ALLIANCE PROPERTY CO., LD. *v.* SHAFFER.

Slade J.

September 1, 1939. In that case the landlords demised a flat which had never been let before to a tenant by a lease dated March 24, 1941, and that lease reserved the rent at 200*l.* a year. The counterpart of that lease was duly executed by the tenant. On the execution of that counterpart there came about, in my judgment—and I think this proposition underlies the decision of the Court of Appeal—a concluded lease between the landlord and the tenant of the premises in question for a rent of 200*l.* a year; and that document constituted the first letting of the premises. If nothing else had happened it would have been clear on the following day (i.) that the premises had been let the day before, (ii.) that that was the first time that they had been let, and (iii.) that the rent reserved was 200*l.* per annum. Therefore 200*l.* per annum, the rent at which the premises were first let after September 1, 1939, would have been the standard rent. What in fact happened was that after the tenant had executed the counterpart, and it does not seem to me to affect the principle whether it was two hours or two days afterwards, he and the landlords executed another document, under which the landlords, in consideration of the flat being taken in an undecorated condition, agreed to reduce the rent by 50*l.* a year during the continuance of the tenancy, thus making the rent actually payable by the tenant 150*l.* a year. On an application by the tenant to the county court to determine the standard rent the county court judge fixed it at 150*l.* a year, which was the difference between 200*l.* a year and the 50*l.* reduction. On appeal to the Court of Appeal, it was held that the rent at which the flat was first let within the meaning of sub-s. 1 (*a*) of s. 12 was 200*l.* a year, or the rent reserved by the original lease. The key to the decision in that case seems to me to be contained in the words of Scott L.J. where he said (1): "It "is to be observed that the lease was completely self-"contained and that the deed executed by the landlords on "the same day necessarily followed the lease in point of ime "since it expressed the reduction in the amount of the rent "fixed by the lease, the counterpart of which had been signed "by the tenant. I agree with the landlord's contention that "that concludes the matter." I understand Scott L.J. in those words to have said this: "The question for decision, "according to the wording of the Act, is what was the rent "at which the flat was first let?" When he said that the

(1) [1944] K. B. 576, 578.

second agreement "necessarily followed the lease in point "of time," he was emphasizing that fact because it was the first document which constituted the first letting; and when he said, "I agree with the landlord's contention that that "concludes the matter," I think that he was saying that the flat was first let by that document, and whatever effect any subsequent document might have upon the contractual obligations of the parties towards each other, nothing could alter the fact that it was the first document under which the premises were first let. I think, therefore, that *White* v. *Richmond Court, Ld.* (1) is distinguishable from the case of *Property Holding Co., Ld.* v. *Clark* (2)—in which case incidentally it was not even cited, possibly because of an oversight or possibly because the point was not thought to be material on the question which arose in that case.

Is there any distinction in law between having the rent and the additional payment contained in the same document on the one hand and having them contained in two documents on the other hand? Before I answer that question, I must deal with one other point which Mr. Hoare raised. He said, and I agree with him, that the correct interpretation to put on the letter of May 18, 1937, from the plaintiffs to Denham was that the option to determine the tenancy by notice had not been exercised in accordance with the terms of the original lease and that the landlords were content to accept the desire of Denham to terminate the agreement. I agree that the correct way to regard the exchange of letters is as a surrender of the existing tenancy and the creation, by agreement, of a new yearly tenancy on the same terms and conditions as the existing tenancy. That yearly tenancy was still in operation on September 1, 1939, and that was the tenancy under which the premises were let at the material date. Mr. Hoare further argued that that clearly put an end to the earlier of the two deeds of May 31, 1934, and, as the latter of the two deeds, by the operative cl. 2, made the later agreement run concurrently with the earlier one, the effect of the termination of the earlier one was also to terminate the later one. I also agree with that, but it does not carry the matter any further, because the yearly tenancy was on the same terms and conditions as the existing tenancy. If therefore the terms and conditions of the old tenancy were to be found in the two deeds and not merely in the one, the terms of the yearly tenancy were the terms contained in the two deeds which had expired. If, on the other hand, the terms and conditions of the old tenancy were to be found in the first deed only the defendant must succeed in any event.

---

(1) [1944] K. B. 576.

(2) [1948] 1 K. B. 630.

I come back therefore to the question whether the fact that there are two deeds instead of one alters the principle which I understand the Court of Appeal to have laid down in *Property Holding Co., Ld.* v. *Clark* (1). In my judgment it does not. The emphasis has been put, in quite a number of cases, upon the necessity for looking at the substance rather than the precise form of the transaction—I am dealing now solely with the Rent Restriction Acts and the words "standard rent" in those Acts—and of giving a liberal interpretation to the word "rent." It is true I have no evidence before me of the circumstances in which the plaintiffs and Denham executed these two deeds on the same day. Of course, the present defendant had nothing to do with Denham. He merely had the good fortune, or the misfortune, to have the standard rent fixed, by the definition in the Act, at a rent at which the flat had been let on a particular date, and he was not a party to either of the two deeds of May 31, 1934. I have no evidence before me as to how these two deeds came to be executed when one deed would have sufficed. I am however entitled to look at the two deeds themselves and draw any legitimate inference. The second of the two deeds of May 31, 1934, was described on the back as a supplemental agreement. It is quite clear that it can have no meaning at all unless it is read in conjunction with the earlier deed of the same date. That agreement is easily identifiable from the recitals in the second deed. You can only find when the second agreement is to terminate by looking at the earlier deed of the same date. Then there is the point, though I place no reliance upon it, that the second agreement is to be binding on the persons in whom the lease is at the time being vested. I think the proper way to regard those two documents is to regard the second one as being supplemental to the first. I think that the intention of the parties was that the premises should be deemed to be enjoyed upon the terms and subject to the liabilities of both documents, and that the additional payments covenanted to be paid under the second deed were intended to form part of the price which Denham was to pay for his beneficial occupation of the flat.

(1) [1948] 1 K. B. 630.

1948

ALLIANCE PROPERTY CO., LD. *v.* SHAFFER.

Slade J.

I inclined to that view before Mr. Blundell cited *Harman* v. *Richards* (1) to me, a case in regard to the construction of deeds which were contemporaneous. He referred me to a passage in the judgment of the Vice-Chancellor (2): "The question "whether several deeds are to be taken as parts of the same "transaction must, as I apprehend, depend upon all the "surrounding circumstances of each particular case, and not "upon the simple fact whether the deeds are or are not by "express reference grafted into or connected with each other; "and we must, therefore, in this case, look to what are the "surrounding circumstances, so far as they affect the "connexion of the deeds." The only circumstances of which I have evidence are those which can be inferred from the language of the documents themselves, and, for the reasons I have indicated, I am satisfied that it was the intention of the parties in this case that the documents should be read together.

I can see no ground for supposing that it was not agreed that the amount to be paid for the enjoyment of these premises—at a time when the parties were at arm's length and the premises were not subject to any control—was 275*l.* a year, and I hold that the standard rent of the premises in question in this action is 275*l.* a year. That being so, there must be judgment for the plaintiffs on the claim for the amount claimed and also judgment for the plaintiffs on the counterclaim.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Clifford-Turner & Co.*
Solicitor for defendant: *Bernard Shaffer.*

R. P. C.

---

(1) 10 Hare 81.

(2) Ibid. 85.

C. A.

1948

July 6, 19.

Scott and Wrottesley L.JJ. and Wynn-Parry J.

onsidered. BAYLIS
. BLACKWELL
[1952] 1 K.B. 154

CURTIS *v.* WILCOX.

Husband and wife—Ante-nuptial tort by husband against wife—Claim for damages—Subsequent marriage of plaintiff and defendant—Wife's separate property—"Thing in action"—Protection and security of wife's separate property—Right of wife to sue husband—Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *ss.* 12, 24.

A claim by a wife against her husband for damages in respect of an ante-nuptial tort is a thing in action within the meaning of s. 24

of the Married Women's Property Act, 1882, and is, therefore, part of her separate property for the protection and security of which she is entitled to maintain an action against her husband in accordance with the provisions of s. 12 of the Act.

Gottliffe v. *Edelston* [1930] 2 K. B. 378 overruled.

APPEAL from Oliver J.

On January 12, 1947, the plaintiff, Vera Curtis, who was at that time a single woman, was being driven in a motor-car by the defendant, G. A. Wilcox, when as the result of his negligence, the car collided with another motor-car. On May 2, 1947, the plaintiff issued a writ against the defendant claiming damages for negligence. On May 26, 1947, the plaintiff married the defendant. By her statement of claim, delivered on June 11, 1947, the plaintiff claimed general damages for pain and suffering and, in addition, special damages for damage to her property, expenses and loss of earnings. On July 21, the defence in the action, which was defended by the insurance company with whom the defendant was insured in respect of his motor-car, was delivered, and it was pleaded by para. 2 thereof that the plaintiff had become the wife of the defendant and was thereby barred from all remedy sought in the action. Oliver J. at the trial, gave judgment for the plaintiff for 72*l.* 13*s.* 0*d.*, the amount claimed as special damages, but in regard to the plaintiff's claim for damages for personal injuries, he held that he was bound to follow the decision of McCardie J. in *Gottliffe* v. *Edelston* (1), to the effect that the plaintiff's right of action was not such a thing in action as would become her separate property within the meaning of the Married Women's Property Act, 1882 (2), and was barred

---

(1) [1930] 2 K. B. 378.

(2) Married Women's Property Act, 1882, s. 1, sub-s. 1: "A married woman shall, in accordance "with the provisions of this Act, "be capable of acquiring, holding, "and disposing by will or other-"wise, of any real or personal "property as her separate "property, in the same manner as "if she were a feme sole, without "the intervention of any trustee."

Sub-s. 2: "A married woman "shall be capable of entering into "and rendering herself liable in "respect of and to the extent of "her separate property on any "contract, and of suing or being "sued, either in contract or in "tort, or otherwise, in all respects "as if she were a feme sole, and "her husband need not be joined "with her as plaintiff or defen-"dant, or be made a party to any "action or other legal proceeding "brought by or taken against her; "and any damages or costs "recovered by her in any such "action or proceeding shall be her "separate property; and any "damages or costs recovered "against her in any such action

by the general disability of husband and wife to sue each other
The plaintiff appealed.

Paget K.C. for the plaintiff. The present case is, in effect an appeal from the decision of McCardie J. in *Gottliffe* v. *Edelston* (1) which Oliver J. found himself bound to follow. McCardie J. held, in circumstances identical with those in the present case, that a right of action for a pure tort against the plaintiff's husband, which accrued before marriage was not a thing in action within the meaning of s. 24 of the Married Women's Property Act, 1882, and consequently was not part of her own separate property within s. 12 of the Act for the protection and security of which she was given the same civil remedies against all persons, including her husband, as if she were a feme sole. That decision has not previously been considered by the Court of Appeal but it was followed by Hallett J. in *Chant* v. *Read* (2). It is submitted that the decision of McCardie J. in *Gottliffe* v. *Edelston* (1) is not good law. It is clear that the plaintiff's action is not one which could be maintained at common law and it must, therefore, be based solely on the provisions of the Married Women's Property Act, 1882. In order to succeed, the plaintiff must establish, firstly, that her right of action is a thing in action within the meaning of s. 24 of the Act, and consequently a part of her separate property, and secondly, that the action against her husband is brought for the protection and security of that property. Dealing with the first question, there is nothing in the Act of 1882 to justify McCardie J.'s view, that a " thing in action " therein is to be construed in any specially narrow sense.

" or proceeding shall be payable " out of her separate property, " and not otherwise."

Section 2 : " Every woman who " marries after the commencement " of this Act shall be entitled to " have and to hold as her separate " property and to dispose of in " manner aforesaid all real and " personal property which shall " belong to her at the time of " marriage, or shall be acquired " by or devolve upon her after " marriage . . . ."

Section 12 : " Every woman, " whether married before or after " this Act, shall have in her own " name against all persons whom- " soever, including her husband, " the same civil remedies, and also " (subject, as regards her husband, " to the proviso hereinafter con- " tained) the same remedies and " redress by way of criminal " proceedings, for the protection " and security of her own separate " property, as if such property " belonged to her as a feme sole, " but, except as aforesaid, no " husband or wife shall be entitled " to sue the other for a tort."

Section 24 : . . . . " The word " property in this Act includes a " thing in action."

(1) [1930] 2 K. B. 378.

(2) [1939] 2 All E. R. 286.

When an Act of Parliament uses a term of art, such as "thing "in action," the expression must be given the meaning which the courts have assigned to it. From the earliest times down to the present day the words chose in action or thing in action, have always included a right of action in tort. The expression "chose in action" first appears in the Year Books in which are to be found several cases where it was held to include a cause of action in trespass, and all the authorities, with one exception, include a cause of action for tort among choses in action. (See Termes de la Ley, 1721 ed.; Brooke's Abridgment, p. 140, Coke upon Littleton, Tomlin's Legal Dictionary (1835), Stroud's Judicial Dictionary, 2nd ed., 308 and Sweet's Legal Dictionary (1882). The only exception is to be found in Blackstone's Commentaries, 8th ed., vol. 2, 396-7, where he states that all property in action depends on contracts, either express or implied, but it is submitted that in view of the consensus of opinion on the subject, the view taken by Blackstone cannot be supported. In more modern times, *In re Park Gate Waggon Works* (1), where it was held that a right of action for damages for tort against the directors of a company was a thing in action, is a clear authority in the plaintiff's favour. It is true that in bankruptcy it has been held that an action for a personal tort does not pass by assignment to a trustee in bankruptcy on the ground that such a right was considered to be of too personal a nature, but assignability is not the test of whether a right is a thing in action (see *Ex parte Vine. Re Wilson* (2) and *Wilson and Another* v. *United Counties Bank, Ld. and Another* (3). Secondly the plaintiff must establish that her action was brought for the protection and security of her separate property. When she married, she owned certain property which included things in possession and things in action. Among the latter was a right against her husband to be compensated for injury to her person and property. By reason of the provisions of the Married Women's Property Act, 1882, that right survived her marriage as part of her separate property. A thing in action can only be preserved by reducing it into possession. Until that is done it is insecure and if it is left in action for more than six years, the right of action disappears by reason of the provisions of the Limitation Act, 1939. The only way of protecting or securing the right of action, which is part of the wife's property, is by the wife recovering a judgment against her husband, as she is entitled to do by s. 12 of the Act of 1882.

---

(1) (1881) 17 Ch. D. 234.
(2) (1878) 8 Ch. D. 364.
(3) [1920] A. C. 102.

Stimson for the defendant. The decision of McCardie J. in *Gottliffe* v. *Edelston* (1) is good law and was properly followed by Hallett J. in *Chant* v. *Read* (2). The real question is whether the action brought by the wife against her husband is a "civil "remedy for the protection of her own separate property" within the meaning of s. 12 of the Married Women's Property Act, 1882, and it is submitted that a cause of action for personal injury is not "a thing in action" within the meaning of the section, and is, consequently, not part of the wife's separate property (see *Brunsden* v. *Humphrey* (3) and *Rose* v. *Buckell* (4)). The prosecution of a purely personal remedy for tort by a wife against her husband falls within the general prohibition against proceedings between married persons contained in the section. In considering whether "thing in "action" includes a right of action in tort, the law must be considered as it stands to-day and not as it stood in the old days when the Termes de la Ley was written. Whether a right of action is a thing in action or not depends on whether it is assignable. An instance of this is s. 48, sub-s. 5, of the Bankruptcy Act, 1914, which provides that things in action pass to a trustee in bankruptcy but it has been held that a cause of action for personal injury does not. By s. 136 of the Law of Property Act, 1925, the assignment of any legal thing in action is valid if done in the manner prescribed, but, this, again, would clearly not apply to a cause of action such as that with which the present case is concerned. In *May and Another* v. *Lane* (5) it was expressly held by Rigby L.J. that a legal chose in action does not include a legal right to recover damages arising out of an assault. McCardie J. was right, when he held that "thing in action" in s. 12 of the Married Women's Property Act, 1882, must be given a limited construction and that it did not include the wife's cause of action in the present case, so as to make such right a part of her property which she was entitled to protect by suing her husband.

Cur. adv. vult.

July 19. The judgment of the court was read by WYNN-PARRY J.

(1) [1930] 2 K. B. 378.
(2) [1939] 2 All E. R. 286.
(3) (1884) 14 Q. B. D. 141.
(4) [1901] 2 K. B. 449.
(5) (1894) 64 L. J. (Q. B.) 236.

At the trial Oliver J., whose attention was drawn to the considered judgment of McCardie J. in *Gottliffe* v. *Edelston* (1), regarded himself as bound by that decision, and, upon the reasoning of that judgment gave judgment for the plaintiff for *72l.* 13*s.* 0*d.*, the amount of the special damage claimed, but gave her no sum by way of general damages.

It is from the judge's refusal to award any sum by way of general damages that the plaintiff appeals to this court.

It will thus be seen that this is in substance an appeal challenging the correctness of McCardie J.'s decision in *Gottliffe* v. *Edelston* (1) which was applied, and the reasoning in which was approved by Hallett J. in *Chant* v. *Read* (2). The facts in *Gottliffe* v. *Edelston* (1) were in all material respects similar to the facts in this case. There the plaintiff, an unmarried woman, sustained injuries through the defendant's negligent driving, and issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him. It was held that her right of action was not such a thing in action as would become her separate property within the meaning of the Married Women's Property Act, 1882, but was barred by the general disability of husband and wife to sue each other./

It is clear, as McCardie J. held, that at common law a wife cannot sue her husband for a tort committed before the marriage. If, therefore, the wife had a cause of action which she could pursue after the marriage it must have been because her right of action in tort, which arose before the marriage, was a thing in action forming part of her estate, which she could reduce into possession by action before marriage; and which by virtue of the Married Women's Property Act, 1882, became part of her separate estate on her marriage; and which, therefore, she could reduce into possession by action after marriage, such action being pursued for the purpose of securing that part of her separate estate.

The reasoning of McCardie J. proceeded on the basis of recognizing that a right of action for damages for tort is a thing in action. He said: "Undoubtedly the phrase 'thing in "'action,' when taken in its broadest possible sense, may "be used to cover such a right as that to bring an action for a "pure tort, such, for example, as for negligence or assault." He held, however, that the phrase "thing in action" as used in the Married Women's Property Act, 1882, was used in a limited sense only and did not cover a right of action in the wife to sue her husband for a tort committed before marriage.

---

(1) [1930] 2 K. B. 378.

(2) [1939] 2 All E. R. 286.

We agree with the view of the learned judge that a right of action in tort is a thing in action. On this point a number of legal dictionaries and abridgments, some of them of considerable antiquity, were referred to by McCardie J. in his judgment and we were referred to some of these, and a number of others, by counsel. We do not propose to refer to them in any detail. It is sufficient to say that apart from a statement in Blackstone's Commentaries, vol. II., p. 397, that all property in action depends on contracts, either express or implied (a statement on which the editor of the twenty-first edition makes the comment "This is too limited, since a right to recover damages "for a wrong is a chose in action which does not arise "out of any contract"), all the books to which we were referred treat a right of action to recover damages for a tort as being a thing in action.

This view has the great authority of Sir George Jessel M.R. to support it. In *In re Park Gate Waggon Works Co.* (1), he said: "The questions raised in this discussion are two. "The first is whether a chose in action of this kind can be "assigned by an official liquidator by virtue of the 95th "section of the Companies Act, 1862, or otherwise. I think "that the case is clearly within the 95th section. There "is in that section no limit whatever in words upon what "can be sold. It enables the liquidator 'to sell the real and "'personal and heritable and movable property, effects, and "'things in action of the company, by public auction or private "'contract, with power to transfer the whole thereof to any "'person or company, or to sell the same in parcels.' The "two demands in question are certainly things in action of the "company. One is said to arise in this way. It is alleged "that the directors, or some of them, sold property belonging "to the company at an undervalue, and the company, through "their liquidator, claims the amount of the loss. This is a "demand for so much money due from the directors to the "company, and is an asset of the company. The other demand "is very similar. It is a case in which the directors are said to "have bought for the company, at the price of 8,000*l.* some "property which one of them had bought a few months before "for 4,081*l.* 5*s.* The company claims the difference between "these two sums, as being money of the company improperly

(1) 17 Ch. D. 234, 239.

C. A.
1948
CURTIS
v.
WILCOX.

"expended by the directors. I have no doubt both those "sums are portions of the property which the company or the "liquidator could dispose of."

It was argued on behalf of the defendant that the test of whether or not a right is a thing in action is whether or not it is assignable, and reliance was placed on s. 25 of the Supreme Court of Judicature Act, 1873, now embodied in s. 196 of the Law of Property Act, 1925, and ss. 38 and 45 of the Bankruptcy Act, 1914. In our view there is no substance in this argument. No assistance for it can be derived from s. 196 of the Law of Property Act, 1925, which, like s. 25 of the Supreme Court of Judicature Act, 1873, is a procedural section; nor from s. 38 or s. 45 of the Bankruptcy Act, 1914, which deal with the assignment of certain things in action for the special purposes of that Act. The existence of things in action as a form of personal property was established long before the right to assign any kind of thing in action was admitted, and it would be strange indeed if it were now the law that the crucial test of whether or not a right was a thing in action was whether or not it was capable of assignment.

The question, therefore, remains whether McCardie J. was correct in his view that "thing in action" as used in the Married Women's Property Act, 1882, has the limited meaning which he attributed to it. The point before us turns on the true construction of the relevant sections of that Act and is unaffected by the Law Reform (Married Women and Tortfeasors) Act, 1935, which, subject to s. 12 of the Married Women's Property Act, 1882, treats a married woman in regard to her property as a feme sole. [His Lordship read ss. 1, 2 and 12 of the Married Women's Property Act, 1882, and continued :]

The effect of s. 2, the language of which is unambiguous, is that in a married woman's separate property there is, or can be, included, without exception, all the real and personal property which belongs to her at the time of the marriage; while the definition of property in s. 24 makes it clear beyond doubt that, as the language of s. 2 itself indicates, her personal property includes her things in action. Under s. 12, the right of suing which is given to a married woman extends, so far as concerns what may be the subject matter of the action, to all her separate property. The limitation which is imposed by the section is not on the kind of property which may be the subject of an action by her, but only on the purpose for which the action

C. A.
1948
CURTIS
v.
WILCOX.

may be brought; it must be for the protection or security of her separate property. It follows, in our judgment, that there is no ground to be discovered in the language of the relevant sections of the Married Women's Property Act, 1882 for holding that " thing in action " is used in that Act in any limited sense.

In our judgment, therefore, the case of *Gottliffe* v. *Edelston* (1) was wrongly decided and is not good law.

It was suggested in argument that the words in s. 12 " but, " except as aforesaid, no husband or wife shall be entitled to " sue the other in tort," were mere surplusage. In a sense this is true, but they serve to emphasize that the section constitutes an exception to the common law rule, which otherwise still applies and would still prevent a married woman from pursuing a purely personal claim against her husband, for example, for damages for libel or slander or assault.

In the result the appeal will be allowed with costs here and below.

Appeal allowed.

Solicitors for the plaintiff: *Gibson & Weldon for C. Leslie Hale, Coalville.*

Solicitors for the defendant: *Kingsford, Dorman & Co., for Harvey, Clarke & Adams, Leicester.*

P. B. D.

---

(1) [1930] 2 K. B. 378.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1948.

BIBL. ONDIN. NIV.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1948, will be as follows :—

In the First Series,
[1948] Ch.
In the Second Series,
[1948] 1K. B. [1948] 2 K. B. [1948] P.
In the Third Series,
[1948] A. C.

INDEX

ACCIDENT — *Personal injury — Child at circus—Lavatory not provided—Reasonable search by child for secluded place to relieve herself—Injury by lion—Child an invitee—Liability of circus proprietors.*
PEARSON *v.* COLEMAN BROTHERS **C. A. 359**

APPEAL BY CASE STATED. *See* FOOD AND DRUGS.

AUCTION. *See* SALE OF GOODS.

BAILOR AND BAILEE — *Conversion — Detinue — Measure of damages — Gratuitous bailment of furniture—Bailee unable to find bailor—Sale of furniture—No agency of necessity—Rise in value of furniture after sale —Liability.*
SACHS *v.* MIKLOS AND OTHERS **C. A. 23**

BURDEN OF PROOF. *See* CRIMINAL LAW.

CHILD—INVITEE. *See* ACCIDENT.

CHOSE IN ACTION. *See* HUSBAND AND WIFE.

CLUB. *See* INDUSTRIAL AND PROVIDENT SOCIETIES.

CONVERSION. *See* BAILOR AND BAILEE.

CRIMINAL LAW — *Controlled prices — Sales by manufacturers of clothing goods at prices in excess of maximum prices fixed by statutory direction—Provision by statutory regulation for imposing minimum penalty—Minimum penalty such amount as will secure that offender derives no benefit from offence—Whether in ascertaining minimum penalty taxes charged on excess amount derived from illegal sales may be deducted — Defence* (*General*) *Regulations*, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 55AB—*The Apparel and Textiles Order*, 1942 (*St. R. & O.* 1942, *No.* 1000), *art.* 1—*The Utility Apparel* (*Infants' and Girls' Wear*) (*Consolidation*) *Directions*, 1945 (*St. R. & O.* 1945, *No.* 1082), *para.* 3 (2).
BETTELEY ADDYMAN AND JALLAND LD. *v.* SINGER - - - - - **Divl. Ct. 405**

CRIMINAL LAW—*continued*

2. —— *Customs and excise offences—Dealing in Swiss watches—Prohibited goods—Uncustomed goods—Goods on which purchase tax had not been paid—Burden of proof on defendant to show legal dealing—Contention on behalf of defendant that burden of proof only shifted to defendant if goods seized—Contention unsustainable—Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36), *ss.* 186, 259.
REX *v.* FITZPATRICK - **C. C. A. 203**

3. —— *Evidence — Appellant charged before justices with indecent behaviour in railway carriage—Voluntary statement by appellant to police : " I have done time for this before "—Statement accepted as evidence by justices—Conviction—Whether statement admissible—Railway Clauses* (*Consolidation*) *Act*, 1845 (8 *Vict.*, *c.* 20), *s.* 109—*Regulation of Railways Act*, 1889 (52 & 53 *Vict.*, *c.* 57), *s.* 7—*London Midland and Scottish Railway By-Laws, by-law* 14.
TURNER *v.* UNDERWOOD - **Divl. Ct. 284**

4. —— *Larceny — Trespasser, to his knowledge, takes golf balls, animo furandi, from private golf course—Golf balls abandoned by their owners—Property in golf balls laid in secretary and members of golf club—Special property of goods on land, in occupier of land, for purposes of charge of larceny.*
HIBBERT *v.* MCKIERNAN - **Divl. Ct. 142**

5. —— *Misdirection — Good character — Misprision of felony — Concealment for benefit.*
REX *v.* ABERG - - - **C. C. A. 173**

DAMAGES. *See* BAILOR AND BAILEE.

DETINUE. *See* BAILOR AND BAILEE.

DISCOVERY. *See* PRACTICE.

EMERGENCY LEGISLATION — *Conditions of employment—Award of National Arbitration Tribunal—Jurisdiction of the court—Fair wages clause—Conditions of Employment and National Arbitration Order*, 1940 (*St. R. & O.* 1940, *No.* 1305) (*as amended by St. R. & O.* 1944, *No.* 1437), *art.* 5 (1.) *and* (3.)—*Cinematograph Films Act*, 1938 (1 & 2 *Geo.* 6, *c.* 17), *s.* 34.
SIMPSON *v.* KODAK, LD. **Sellers J. 184**

2. —— *Food rationing—Cheese and fats—Catering establishment—Use of excess quantity of rationed goods during rationing period—Cheese and fats processed to prevent deterioration—Whether "used" in contravention of order—The Fats, Cheese and Tea* (*Rationing*) (*No.* 2) *Order*, 1946 (*St. R. & O.* 1946, *No.* 1116), *arts.* 8 *and* 10.
QUAINTWAYS RESTAURANT, LD. *v.* BUDD **Divl. Ct. 231**

3. —— *Requisitioning of unoccupied houses—For the inadequately housed—Evidence of delegation of power to requisition—Letter from Ministry of Health purporting to be written on behalf of the Minister—Letter authorizing requisitioning of part of house—Part not specified in letter—Defence* (*General*) *Regulations*, 1939, *reg.* 51—*Emergency Powers* (*Defence*) *Act*, 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 7.
CARLISH *v.* EAST HAM CORPORATION AND EDWARDS - - **Lord Goddard C.J. 380**

ESTOPPEL. *See* VENDOR AND PURCHASER.

EVIDENCE. *See* CRIMINAL LAW.

FOOD AND DRUGS—*Sale of adulterated milk—Proceedings against dairyman—Information preferred by defendant against supplier as third party—Charges against defendant and third-party dismissed—Appeal by prosecutor—Case stated by justices—Supplier not made a party—Necessity for joining third-party—Food and Drugs Acts*, 1938 (1 & 2 *Geo.* 6), *c.* 56), *ss.* 24, 83.
ELKINGTON *v.* KESLEY - **Divl. Ct. 256**

FOREIGN JUDGMENT — *Registration in this country—Application to set aside registration—Fraud on foreign court—Facts in relation to fraud known at the time of judgment—Defence of fraud not raised at trial—Prima facie case of fraud made out on application for issue—Power of court on trial of issue to go into defences which could have been raised at trial—Issue directed, subject to a condition—Jurisdiction—Foreign Judgments* (*Reciprocal Enforcement*) *Act*, 1933 (23 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 1; *s.* 4, *sub-s.* 1 (*a*) (iv).
Re THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933. SYAL *v.* HEYWOOD AND ANOTHER - **C. A. 443**

GAMING — *Cause of action — Consideration—Threat to report loser of bet as defaulter—New promise by loser to pay bet—No promise by winner to forbear from reporting as defaulter—Forbearance, in fact, from reporting—Consideration for new promise.*
BOB GUINESS LD. *v.* SALOMONSEN **Denning J. 42**

HABEAS CORPUS — *Military law — Officer holding emergency commission released from military duty—Arrested after release—Subsequently convicted by court-martial of offences committed before release—Whether subject to military law after release—Jurisdiction of court-martial—Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Army Act*, 1881 (44 & 45 *Vict.*, *c.* 58), *ss.* 158, 175, *sub-ss.* 1, 190, *sub-s.* 8—*Royal Warrant for regulating Pay, Appointment, Promotion and Non-Effective Pay of the Army*, 1940, *art.* 21—*Royal Warrant, dated June* 18, 1945—*Army Order* 83.
REX *v.* GOVERNOR OF WORMWOOD SCRUBS PRISON. *Ex parte* BOYDELL **Divl. Ct. 193**

HIGHWAY (*for vehicles and foot passengers*)—*Stopped up during war—Order for permanently stopping up—Provision for L.C.C. to dedicate footway on site of highway stopped up—Provision for improvements to neighbouring highways—Nature of, and time for, not stated in order—Requisitioned Land and War Works Act*, 1945 (8 & 9 *Geo.* 6, *c.* 43), *Part III.*, *ss.* 15 *to* 22.
In re AN APPLICATION BY BECK AND POLLITZER AND OTHERS AND *In re* THE REQUISITIONED LAND AND WAR WORKS ACT, 1945 - - **Croom-Johnson J. 339**

HUSBAND AND WIFE — *Ante-nuptial tort by husband against wife—Claim for damages—Subsequent marriage of plaintiff and defendant—Wife's separate property—"Thing in "action"—Protection and security of wife's separate property—Right of wife to sue husband—Married Women's Property Act*, 1882 (45 & 46 *Vict.*, *c.* 75), *ss.* 12 *and* 24.
CURTIS *v.* WILCOX - - **C. A. 474**

2. —— *Maintenance order—Made whilst husband and wife are living separately—Wife returns to husband's house as tenant of part of it—No resumption of cohabitation—Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 & 59 *Vict.*, *c.* 39), *ss.* 4 *and* 5—*Summary Jurisdiction* (*Separation and Maintenance*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 2, *sub-s.* 2.
THOMAS *v.* THOMAS - - **Divl. Ct. 294**

INDUSTRIAL AND PROVIDENT SOCIETIES—*Club—Suspension or expulsion of member—Non-compliance with rules—Provision for arbitration — Applicability — Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict.*, *c.* 39), *s.* 49, *sub-s.* 1.
JUDSON *v.* ELLESMERE PORT EX-SERVICEMEN'S CLUB - - - - **C. A. 52**

INVITEE. *See* ACCIDENT.

JURISDICTION — *Limitation of proceedings —Execution—Action upon a judgment— R. S. C. Or.* 42, *r.* 23 (*a*)—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 4.
W. T. LAMB & SONS *v.* RIDER **C. A. 331**

LANDLORD AND TENANT — *Application for new lease—Notice by sub-tenant of premises to his immediate landlord, the tenant, and sent on by latter to the superior landlord—Offer by superior landlord of new lease not accepted by sub-tenant—Offer out of time—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4 *and* 5.
RACKETT *v.* ASTON & CO., LD. AND CORNELIUS - - - - - **C. A. 157**

2. —— *Furnished letting—Future rent reduced by rent tribunal—Limitation of rent by county court judge to enable tenant to recover past overpayments—Notice to quit—Tenant's claim to hold over a statutory tenant—Rent with which weekly payments for use of furniture to be compared—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*)—*Furnished Houses* (*Rent Control*) *Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2.
BOWNESS *v.* O'DWYER - **C. A. 219**

3. —— *Furnished houses rent control— Jurisdiction of rent tribunals—Houses controlled by Rent Restriction Acts—No power to reduce rent below standard rent—Furnished Houses* (*Rent Control*) *Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 7.
REX *v.* PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL. *Ex parte* BEDROCK INVESTMENTS LD. - - - **C. A. 413**

4. —— *Furnished houses rent control — Jurisdiction of rent tribunal—Letting of flat— Articles left by landlord in flat otherwise unfurnished—Whether rent included payment for use of furniture—Furnished Houses* (*Rent Control*) *Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2, *sub-ss.* 1 *and* 2.
REX *v.* BLACKPOOL RENT TRIBUNAL. *Ex parte* ASHTON - - - **Divl. Ct. 277**

5. —— *Quarterly tenancy — Term restricting landlords' right to give notice within three years of tenancy—Sale of reversion without notice of covenant—Obligation " with reference " to the subject matter of the lease "—Covenant affecting landlord qua landlord—Term binding on purchaser without notice—Repugnancy— Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 2), *s.* 142.
BREAMS PROPERTY INVESTMENT CO., LD. *v.* STROULGER AND OTHERS - - **C. A. 1**

6. —— *Rent restrictions — Definition of " dwelling-house "—Two flats on same floor of house let separately to two respective tenants —Right of each tenant to use kitchen, bathroom and w.c. on same floor—Whether sharing of kitchen prevented either flat from coming within statutory definition of " dwelling-house "— Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1.
LLEWELLYN *v.* HINSON. LLEWELLYN *v.* CHRISTMAS - - - - **C. A. 385**

7. —— *Rent restriction — Dwelling-house required by landlord for person engaged in his whole-time employment—Commencement of work delayed by illness of employee—Effect— Termination of employment between hearing in county court and hearing of appeal—Whether to be considered—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*g*).
R. F. FUGGLE LD. *v.* GADSDEN **C. A. 236**

8. —— *Rent restriction — Joint owners of dwelling-house — House required for occupation by one owner—Application by owners— Validity — Suitable alternative accommodation —Insufficiency for all tenant's furniture— Whether relevant per se—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-ss.* 1, 3, *sch. I., para.* (*h*).
MCINTYRE AND ANOTHER *v.* HARDCASTLE **C. A. 82**

9. —— *Rent restrictions — New control* (1939) *house — " Lets any dwelling-house to " which this Act applies or any part thereof "— Rent including payment for use of furniture— Furnished rooms let with use of a kitchen— Such use shared also by another tenant— Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 10—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch. I.*
BANKS *v.* COPE BROWN - **Divl. Ct. 287**

10. —— *Rent restriction—Standard rent— House damaged by enemy action—Reconstruction and addition of land—Effect on identity— Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1, 2 (iii.).
HEMNS *v.* WHEELER - - - **C. A. 61**

11. —— *Rent restriction—Standard rent— "Rent "—Rent reserved by lease—Additional payments reserved by supplemental agreement —Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*).
ALLIANCE PROPERTY CO., LD. *v.* SHAFFER **Slade J. 464**

12. —— *Rent restriction — Statutory tenant —Prolonged absence from demised premises—*

LANDLORD AND TENANT—*continued*
Imprisonment—Onus of proof—Presumption that occupation had ceased—To repel presumption animus possidendi and corpus possessionis to be proved by tenant.
BROWN *v.* BRASH AND AMBROSE **C. A. 247**

13. —— *Rent restriction — "Tenant" — Children living with tenant at her death intestate—Tenancy determined while vested in "Probate Judge"—Claim to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*), *as amended by Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 9.
SMITH AND ANOTHER *v.* MATHER AND ANOTHER - - - - **C. A. 212**

14. —— *Rent restrictions — Whether two combined flats let together constituted a single "separate dwelling-house"—"Rateable value "on appropriate day"—Reduction of assessments of each flat—Effect of reduction on question whether flats were controlled by Rent Acts—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1; *s.* 7, *sub-ss.* 1 *and* 3.
LANGFORD PROPERTY CO., LD. *v.* GOLDRICH - - - - **Birkett J. 423**

15. —— *Trade or business carried on in demised premises—Claim for new lease—Adherent goodwill—Reasonableness — Good estate management — Premises required by landlord's firm—Whether required for landlord's "own occupation"—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4 *and* 5.
CLIFT *v.* TAYLOR - - **C. A. 394**

16. —— *See* PUBLIC HEALTH.

LIMITATION. *See* JURISDICTION.

LOCAL GOVERNMENT — *District auditor — Power to surcharge—Persons surchargeable—Limitation to member officer or servant of local authority—Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 228, *sub-s.* 1 (*d*).
Re DICKSON. *Re* LOCAL GOVERNMENT ACT, 1933 - - - - - - **C. A. 95**

MASTER AND SERVANT — *Agricultural worker — Minimum wage—Contract providing for no pay during illness—Absence for period of complete weeks—Claim for arrears of wages —Agricultural Wages (Regulation) Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 37), *s.* 2, *sub-s.* 1; *s.* 7, *sub-ss.* 1, 10.
SMART *v.* SPENCER - - **C. A. 105**

NEGLIGENCE — *Decorator at work in house —House left unattended with door unlocked—Theft—Decorator's duty—Liability.*
STANSBIE *v.* TROMAN - - **C. A. 48**

2.——*See* PETITION OF RIGHT.

MILITARY LAW. *See* HABEAS CORPUS.

PENSIONS APPEALS — *Stare decisis — Conflicting decisions of English and Scottish courts—"War risk injury"—Existence of abnormal conditions—Interpretation ejusdem generis—War Pensions (Naval Auxiliary Personnel) Scheme,* 1946 (*St. R. &* O. 1946, *No.* 1640), *first schedule, para.* 2 (*d*)—*Pensions (Mercantile Marine) Act,* 1942 (5 *&* 6 *Geo.* 6, *c.* 26), *s.* 1, *sub-s.* 2.
MINISTER OF PENSIONS *v.* HIGHAM **Denning J. 153**

PETITION OF RIGHT — *Claim by ex-sergeant to money taken from him by military authorities in Cairo—Money acquired by ex-sergeant in consideration of his presence in uniform in loaded civilian lorries in Cairo—Relation of Crown to ex-sergeant same as relation of master and servant—Use by servant of facilities given to him by master—Money acquired solely by use of uniform and military position—Crown entitled to money.*
READING *v.* THE KING **Denning J. 268**

PIGEONS. *See* TRESPASS.

POLICE — *Metropolitan police officer injured through negligence of defendant—Hospital charges and officer's wages and allowances during illness paid by receiver for metropolitan police district—Custodian of fund for purposes of police—Power of Receiver to sue for, and right to recover, expenses from defendant—Metropolitan Police Act,* 1829 (10 *Geo.* 4, *c.* 44), *s.* 12—*Metropolitan Police Act,* 1861 (24 *&* 25 *Vict., c.* 124), *s.* 1.
RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* TATUM - **Atkinson J. 68**

PRACTICE—*Discovery—Affidavit of documents—Objection to producing police note-books—Ground of objection that the note-books related solely to the defendants' case and not to the plaintiffs' case—Objection upheld.*
BROOKES AND ANOTHER *v.* PRESCOTT AND OTHERS - - - - **C. A. 133**

2. —— *Parties — Action begun in name of a firm—Sole proprietor dead at date of writ—Application to substitute his executrix as plaintiff—Misnomer—R. S. C. Or.* 16, *r.* 2, *Or.* 48, *r.* 1.
ALEXANDER MOUNTAIN & CO. (SUING AS A FIRM) *v.* RUMERE, LD. - **C. A. 436**

PUBLIC HEALTH — *Local government — Justices — Landlord and tenant — Dustbin —Supplied by landlord to tenant as a privilege,*

PUBLIC HEALTH—*continued*
not under contractual or other liability—Notice by local authority requiring landlord, as owner. to supply dwelling-house with dustbin of certain dimensions and construction—Appeal to court of summary jurisdiction—Jurisdiction of justices—" Transfer to a " tenant of any burden or liability previously " borne by the landlord "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3 —*Public Health Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 75.
First National Housing Trust, Ld. *v.* Chesterfield Rural District Council **Divl. Ct. 351**

RATING — *Amendment of valuation list — Proposal — Sufficiency of grounds stated—Rating and Valuation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 2 (*b*).
Rex *v.* Winchester Area Assessment Committee. *Ex parte* Wright **C. A. 455**

2. —— *Exemptions—Lands exempted by private enclosure Act from " all parochial " taxes and duties "—No scheme made—Exemption from general rate—Land let on nine hundred and ninety-nine years' lease—" Belongs " to freeholder—Stat.* 17, *Geo.* 3, *c.* cxxv.—*Rating and Valuation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 2, *s.* 64, *sub-ss.* 1 *and* 2, *s.* 69, *sub-s.* 2.
Wiltshire County Valuation Committee *v.* Boyce. Wiltshire County Valuation Committee *v.* Marlborough and Ramsbury Rating Authority and Orchard - - - - **C. A. 125**

3. —— *Proposed amendment of valuation list—Building contractor's offices, canteens, huts, structures, land, etc.—Beneficial occupation—Rateable occupation—Rating and Valuation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 10.
John Laing & Son, Ld. *v.* Assessment Committee for Kingswood Assessment Area and Others - - **Divl. Ct. 116**

SALE OF GOODS—*Of the value of* 10*l. or upwards—Note or memorandum in writing, signed by the defendant—Sufficiency of—Name of plaintiff incorporated from subsequent solicitor's letter—Term of contract, seller to deliver to address designated by buyer—Not included in memorandum—Sale of Goods Act,* 1893 (56 & 57 *Vict., c.* 7), *s.* 4, *sub-s.* 1, *s.* 29, *sub-s.* 1.
Walford *v.* Narin - - **Morris J. 176**

SALE OF GOODS—*continued*
2. —— *Sale at auction—Passing of property—Misrepresentations by purchaser as to his identity—Sale of Goods Act,* 1893 (56 & 57 *Vict., c.* 71), *ss.* 18, 28, 39.
Dennant *v.* Skinner and Collom **Hallett J. 164**

STAGE CARRIAGE — *Electric tram car — Driving offence — " Wanton and furious " driving " — Negligence — Injury by driver to property of owner of stage carriage—Stage Carriages Act,* 1832 (2 & 3 *Wm.* 4, *c.* 120), *ss.* 5 *and* 48.
Chapman *v.* Kirke - - **Divl. Ct. 450**

TITHE — *Redemption annuities — Land in possession of two or more owners—Duty of Tithe Redemption Commission to apportion—Liability, pending apportionment, of part owner for whole instalment of original annuity —Tithe Act,* 1936 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 43), *ss.* 3, *sub-s.* 1; 10, *sub-ss.* 1, 2; 13, *sub-s.* 7; 16, *sub-s.* 1.
Tithe Redemption Commission *v.* Brown **C. A. 9**

TOWN PLANNING — *Interim development control—Resolution to prepare a scheme under Town and Country Planning Act,* 1932—*Street zoned as " intermediate," to be included in a scheme—Development of land in street, prohibited by interim development authority—Appeal to court of summary jurisdiction—Jurisdiction—Consideration by justices of reasons actuating authority — Town and Country Planning (Interim Development) Act,* 1943 (6 & 7 *Geo.* 6, *c.* 29), *s.* 5, *and sch. I.*
Swindon Corporation *v.* Pearce and Pugh - - - - - **Divl. Ct. 301**

TRESPASS — *Racing pigeons—Damage to crops — Pigeons shot by farmer — Property in pigeons— Whether action maintainable by owner—Right of farmer to shoot trespassing birds in defence of his crops.*
Hamps *v.* Darby - - **C. A. 311**

VENDOR AND PURCHASER — *Sale of farm —Purchaser's liability to pay " outgoing " valuation " to tenant — Construction — Tenant's liability for dilapidations excluded by collateral agreement with landlord—Sum payable to tenant pro tanto increased—Estoppel.*
Oades *v.* Spafford and Another **C. A. 74**

BIBL. LONDIN UNIV.